93-202

Supreme Court, U.S.
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SUPREME COURT OF THE UNITED STATES

OCTOBER 1993 TERM

KURAHARA & MORRISSEY,
Petitioner, Appellant and
Real Party In Interest,

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION,
Respondent, Appellee and
Plaintiff.

Petition for Writ of Certiorari
to the United States Court
of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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17 pp

ISSUES PRESENTED

(1) Where a federal agency (FDIC) has entered into a written settlement of civil litigation initiated by it providing for the unconditional release and dismissal of all unadjudicated claims "arising out of, or incidental to, (1) the Action [itself] [or] (2) the events giving rise to the Action " -- which Settlement Agreement was then twice ratified and approved by the District Court (with no pertinent reservation of jurisdiction) -- **does the District Court thereafter have jurisdiction** to entertain and grant a motion by the federal agency against the attorneys for the settling defendant for a refund of attorneys fees previously paid (allegedly in violation of a preserve-the-status-quo Preliminary

Injunction) in light of cases such as Gompers v. Bucks Stove & Range Co., 211 U.S. 418 (1911) holding that following a dismissal of a civil action a District Court no longer has jurisdiction to enforce a pendente lite preliminary injunction?

(2) As a matter of public policy, to what extent may a plaintiff federal agency influence ("chill"?) a citizen's right to the effective assistance of counsel by challenging counsel's strategic and tactical professional decisions in multi-party high-stakes civil litigation, with potential criminal follow-on consequences for the client, and requiring a refund of attorney's fees earned and litigation costs expended if a District Court decides after the fact that the defense attorney has failed to prove that said fees and costs were not earned and incurred in violation of a

preliminary injunction allowing the citizen-defendant to only pay counsel's "reasonable professional statements"?

(2)(a) To the extent that such second-guessing is permissible at all, may the burden of proof be imposed upon counsel to prove his and his client's innocence of the alleged violation of the preliminary injunction?

(2)(b) What is the appropriate standard for judging the "reasonableness" of attorney's fees incurred in defense of civil litigation initiated by an agency of the federal government? In particular, may attorney's fees be adjudged to be "unreasonable" simply because they do not correlate to any then-pending motion?

(3) Given FDIC's Notice of Motion, did the District Court's retroactive shifting of the burden of proof violate Appellant's rights to Due

Process Notice?

(4) Was FDIC's right to seek a refund from K&M for allegedly excessive or unreasonable payments to K&M for attorney's fees and costs dependent upon the Ferm's purported assignment to FDIC of their potential chose in action against K&M? Should such an assignment be universally regarded as illegal and void because contrary to public policy (as the California courts have held)?

(5) Was the 1987 Injunctive Order allegedly violated sufficiently specific to be enforceable in any event?

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OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit was rendered by an unpublished Memorandum opinion, filed February 8, 1993, the text of which appears in the separately-bound Appendix to this Petition beginning at page one thereof. There was a prior appeal (relating to a different order of the District Court that governed the relationship of the parties subsequent to November 1, 1988) which petitioner believes is not directly pertinent to the present appeal (which is based upon an earlier order that governed the period between October of 1987 and October of 1988), but is pertinent to an overall understanding of the context of the present appeal. This prior appeal is reported at 909 F.2d 372. No question

regarding the order affirmed on the prior appeal is presented by this appeal.

JURISDICTION OF THIS COURT

The judgment of the Court of Appeals was entered February 8, 1993, and petitioner's timely petition for rehearing was denied April 21, 1993. This court has discretionary jurisdiction pursuant to 28 U.S.C. § 1224(1) [certiorari after a decision by the United States Court of Appeals].

PERTINENT CONSTITUTIONAL PROVISIONS, TREATIES, ETC. (Rule 14(f))

Petitioner believes that this case is governed entirely by decisional law. Since there is a question of fundamental federal court jurisdiction involved, the cases are, of course, ultimately

interpreting the meaning of Article III of the United States Constitution. There is also a Due Process Notice and Opportunity to be Heard question, so that familiar constitutional requirement is also involved. Many of the pertinent cases interpret the implications of Federal Rules of Civil Procedure, Rule 41 (voluntary dismissals and dismissals by stipulation). For all practical purposes, the decisions of the courts below, and the parties' legal briefs, turn entirely upon the facts of record and decisional law.

STATEMENT OF THE CASE

This is an appeal from a post-judgment -- more precisely, a post-Stipulated Dismissal of Unadjudicated Claims, and Order thereon -- Order by the District Court to Repay Unreasonably

Incurred Attorneys Fees and Costs received by Petitioner, the law firm of Kurahara & Morrissey ("K&M"), allegedly in violation of a preserve-the-status-quo preliminary injunction.

After FDIC had joined in a written Stipulation for Dismissal of all unadjudicated claims arising from FSLIC/FDIC's First Amended Complaint against Kimberleigh and LaVonne Ferm, which the District Court had ratified and approved [App. 20-23], which unconditionally dismissed all unadjudicated claims, FDIC subsequently filed a Notice of Motion for an order requiring K&M to pay to FDIC some $581,680.42 of alleged unreasonably incurred attorneys fees and costs that the Ferms had previously paid to K&M or, in the alternative, an order requiring an accounting by Appellant K&M (counsel for the Ferm Defendants in the underlying

litigation) [App. 87-90].

Although styled as a "motion", the correct character of the proceedings below has been that of a Civil Contempt Proceeding, since the gravamen of FDIC's grievance is that K&M allegedly violated a preserve the status quo Preliminary Injunction that the District Court had made in 1987.

On June 26, 1991, the District Court made a tentative ruling granting FDIC's motion on the rationale that "[t]he fee applicant [K&M] has the burden of producing satisfactory evidence . . . that the claimed rate and number of hours are reasonable." [see App. 53]. After recalculating the figures that FDIC had proferred, the District Court made its final ruling on August 8, 1991, penalizing K&M Three Hundred Ninety-eight Thousand Eleven Dollars and Ninety-seven Cents ($398,011.97) for not having

already volunteered the accounting re the 1987-1988 period in question that FDIC had requested as alternative relief [App. 46-48]. No court order requiring K&M to provide an accounting re the 1987-1988 period in question had ever been made. This appeal follows. The Court of Appeals for the Ninth Circuit affirmed the Order in an unpublished Memorandum Opinion [App. 1].

STATEMENT OF FACTS

On September 16, 1986, FSLIC (FDIC's predecessor in interest) filed the underlying civil action against John Molinaro, and others, seeking recoupment of millions of dollars that had allegedly been misappropriated from Ramona Savings and Loan. Jurisdiction of the underlying litigation was based upon 28 U.S.C. §§ 1331 and 1345, and 12 U.S.C. § 1819

[basically an action where the Federal Government is a plaintiff].

On June 1, 1987, FSLIC filed its First Amended Complaint, adding, in pertinent part, Kimberleigh Ferm (Mr. Molinaro's former wife) and her Mother, LaVonne Ferm. The Ferms hired Appellant, K&M, to represent their interests in the underlying civil action.

Approximately four months later, in October of 1987, FSLIC secured a TRO, and in due course a preliminary injunction, against Kimberleigh Ferm freezing all of her assets pendente lite, except for Two Thousand Dollars ($2,000) per month for reasonable living expenses, plus what may be "necessary" to retain counsel [CR 404, 449]. On November 9, 1987, a Stipulation and Order modifying the preliminary injunction was filed. In pertinent part, the modified preliminary injunction allowed Ms. Ferm to withdraw up to Five

Thousand Dollars ($5,000) per month for reasonable living expenses, plus funds to pay K&M's "reasonable professional statements." [See App. 18-19.]

On April 26, 1988, FSLIC filed a motion for an accounting by K&M and repayment of alleged unreasonable charges for attorneys' fees and costs [CR 919]. The Ferm Defendants opposed the motion, contending, inter alia, that providing FSLIC with copies of K&M's monthly statements to its clients threatened to impermissibly intrude upon the attorney/client privilege and the work product doctrine [CR 979]. The District Court adopted a middle ground, denying FSLIC's Motion without prejudice to refiling at the conclusion of the litigation [CR 1053].[1]

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[1]Quoting the Docket Entry: "The Court denies plaintiff's motion in its entirety without prejudice to refiling at the conclusion of this litigation. Since

On November 11, 1988, FSLIC moved for a less ambitious order, this time requesting only that K&M submit its monthly statements to the District Court for in camera review and approval [CR 2098]. This motion was granted on December 27, 1988 [CR 2184], and affirmed on appeal [909 F.2d 372]. While the prior appeal was pending, K&M fully complied with the Order of December 27, 1988.

Except for the month of November of 1988 (which FDIC's post-dismissal motion had carelessly double-counted),[2] there

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plaintiff has access to Ferm's bank records, it can monitor amounts withdrawn for fees and then move for an accounting of the entire amount once trial is completed. At that time, it would appear that no countervailing interests of Ferm or her counsel would come into question."

[2]The District Court had previously determined that $25,898.50 constituted a reasonable attorney fee for the month of November of 1988 [CR 1988]. FDIC's motion sought repayment re November of 1988, overlooking the District Court's

is no present dispute re the period governed by the Order of December 27, 1988. Rather, the present dispute relates entirely to what may be termed the "gap period" -- the time between the entry of the above-described "freeze order" (the October 7, 1987, TRO) and the effective date of the December 27, 1988, in camera accounting order (treated as effective on November 1, 1988, by the parties and the District Court; see CR 2248).

Eventually, FSLIC/FDIC and the Ferm Defendants forged a compromise settlement of the underlying litigation. K&M made a routine motion for determination that the settlement was in good faith vis-a-vis the other defendants (so as to foreclose follow-on cross-complaints for indemnity or contribution; see Cal. Code of Civil

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prior final order regarding that month.

Procedure § 877.6) [CR 2601-2063]. FDIC joined in the good faith settlement motion [CR 2604], and the District Court granted the good faith settlement motion [CR 2613]. No mention of any reservation of jurisdiction to entertain a motion by FDIC against K&M re alleged excessive fees in 1987-1988 appears in either party's papers regarding this good faith settlement motion.

After the District Court had approved the good faith settlement motion, FDIC and the Ferm Defendants filed their Stipulation for Dismissal of Unadjudicated Claims, which the District Court ratified [App. 20-23]. Once again, the parties' Stipulation is entirely silent re any sort of reservation of jurisdiction to subsequently adjudicate any claim by FDIC against K&M for repayment of allegedly unreasonable fees and costs received during the 1987-1988

"gap period."[3]

Having resolved the litigation against the Ferm Defendants by compromise settlement,[4] FDIC then promptly reneged upon the plain meaning of its Settlement Agreement and Stipulation for Dismissal of Unadjudicated Claims by filing a motion seeking adjudication of its previously unadjudicated claim against Ms. Ferm/K&M re an alleged violation of the 1987 preliminary injunction/freeze order [CR 2635; see App. 87-90].

It is axiomatic that, in the absence

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[3]The Stipulation was filed on March 6, 1991, and the Ratifying Order was entered the next day, March 7, 1991 [see App. 20]. No appeal was taken by either side from this Ratifying Order, which is therefore now final.

[4]The Settlement Agreement and Release expressly recited that it inured to the benefit of the parties and their respective attorneys [App. 84, ¶19], and expressly promised to dismiss and release both all unadjudicated claims arising from the action itself and the events giving rise to the action [App. 78-79, ¶14].

of a court order to the contrary, the burden of proof upon a motion falls upon the shoulders of the moving party (FDIC here). Since the true character of FDIC's "motion" is that of an Order to Show Cause re Civil Contempt [see Gompers v. Bucks Stove & Range Co., 211 U.S. 418 (1911)], the burden of proof that FDIC should have been required to shoulder was proof by clear and convincing evidence [Matter of Battaglia, 653 F.2d 419, 422, 424 (9th Cir. 1981); Fox v. Capital Co., 96 F.2d 684, 686 (3rd Cir. 1938)].

So viewed, FDIC's "motion" failed seriously to carry its burden of proof. The District Court rejected FDIC's contention that K&M's billing rates were unreasonably high [App. 52-53] and also found FDIC's arithmetic to be less that satisfactory [App. 47, fn. 1]. Well over half of the challenged hours were said to be "inadequately documented" because

FDIC's counsel could not conveniently match-up the services rendered with whatever may have been the pending motion or ex parte application of the week [see CR 2635, Lee Decl., p. 24, lines 19-21].[5]

More fundamentally, the District Court simply lacked jurisdiction to hear and determine FDIC's "motion." Reduced to its bare essentials, FDIC's "motion" was an effort to redress an alleged violation of the preserve-the-status-quo pendente lite preliminary injunction that the District Court had issued back in

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[5]This is a dubious proposed Legal Standard, since review and study of the documentary evidence is a necessary and proper incident of counsel's duty to prepare for trial -- a task that is entirely independent of whatever pleading or discovery squabbles might arise along the way to trial. Incredibly, the District Court "essentially adopted plaintiff's analysis of K&M's billing statements," [App. 40:2-4], and thereby erroneously applied this incorrect legal standard.

1987. Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 445, 451-452 (1911) -- recently favorably cited by this court in Cooter & Gell v. Hartmarx Co., 496 U.S. ___, 110 L.Ed.2d 359, 375-376 (1990) -- squarely holds that the right to complain about alleged violations of pendente lite preliminary injunctions evaporates upon compromise settlement of the underlying case.

FDIC's original moving papers had merely assumed that the District Court had jurisdiction to entertain FDIC's refund motion [CR 2635]. K&M correctly noted that, since the case had been dismissed, there was no longer a pending case (a fundamental requisite to jurisdiction) [CR 2642, p. 5]. In its not-subject-to-rebuttal Reply Papers filed a few days before the hearing on the Motion, FDIC "sandbagged" its initial presentation of the purported basis for

jurisdiction [CR 2644].[6] The District Court agreed with FDIC's interpretation of Commodity Futures Trading Com'n v. Co Petro Mktg., 700 F.2d 1279 (9th Cir. 1983) [App. 50:4-15, is traceable to nearly identical language in FDIC's Reply Papers at CR 2642, p. 4]. (The "lesson" of the Commodity Futures case championed by FDIC, and endorsed by the District Court, is merely 180° contra from the actual holding of the Commodity Futures case.)

Although the District Court agreed in general principle with FDIC's legal position, it was not entirely satisfied with FDIC's calculations, and so the motion was taken under submission. While

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[6]None of the eight cases cited in FDIC's ten-page belated attempt to demonstrate jurisdiction involved a disposition of the underlying case by compromise settlement and Stipulated Dismissal, or any other sort of dismissal of the underlying case.

the motion was still under submission, on August 5, 1991, K&M filed a motion to vacate the order of the submission and dismiss the proceeding, briefing in greater detail what K&M had earlier considered to be the self-evident proposition that a court's jurisdiction over a formerly pending case evaporates upon compromise settlement and stipulated dismissal of the case [CR 2648]. K&M's motion to vacate [etc.] also questioned the propriety of the District Court's sua sponte June 24, 1991, Tentative Ruling that K&M had the burden of proof that it was innocent of FDIC's allegations that K&M was guilty of civil contempt (violation of the preliminary injunction).

Two days later, on August 7, 1991, the District Court filed its Order to Repay Unreasonably Incurred Attorney's Fees and Costs [App. 24-55], which is the

object of this appeal.

On appeal, K&M cited over a dozen cases on the jurisdictional issue, and (incredibly) FDIC contended that the cases cited by K&M had been overruled by Cooter & Gell [App. Opening Brief 10-24; Brief of Appellee 31]. The Ninth Circuit's Memorandum Opinion addressed none of the jurisdictional authorities discussed by the parties, holding that the settlement agreement preserved the jurisdiction that Gompers authoritatively teaches expires upon dismissal [App. 5]. Numerous cases, including American Fire & Casualty Co. v. Finn, 341 U.S. 6, 18 (1951), which the Ninth Circuit was duty-bound to follow, hold that if jurisdiction is absent, it cannot be conferred by waiver, estoppel, consent, agreement or stipulation [accord: Morongo Band of Indians v. Cal. St. Bd. of Equal., 858 F.2d 1376, 1380 (9th Cir.

1988)].

Probably the most important public policy issue presented by this appeal concerns the character of the proceeding below and the claim that FDIC was asserting. The District Court and the Court of Appeals took fundamentally different views -- neither of which is tenable -- with the anomalous result that the Court of Appeals affirmed the order in the face of K&M's jurisdictional objection by holding that the District Court had jurisdiction to do something ("enforce the settlement agreement" [see App. 5]) that the District Court had expressly held it was not doing [see App. 50-51, ¶2].

As part of the settlement agreement between FDIC and K&M's clients, FDIC had insisted that K&M's clients assign to FDIC all claims and choses in action that

the clients might have against K&M.[7] (In the absence of such an assignment, of course, any right to a refund for alleged overcharges for attorneys' fees and costs

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[7]The assignment provision is the "Paragraph 2(d)" obliquely referred to in Chapter I of the Court of Appeals' Memorandum opinion. This sub-paragraph provided as follows:

> "(d) The Ferms shall transfer and assign all right, title and interest they have in any claims or choses in action against Kurahara & Morrissey or any member or employee thereof, hereby waive the attorney client and attorney work product privileges with regard to all sums paid to Kurahara & Morrissey from the BankCal Accounts, agree to provide to FDIC within seven days of the effective date copies of all retainer agreements and amendments thereto and all invoices for fees and costs received from Kurahara & Morrissey which are in their possession, and agree to cooperate with FDIC in any motion for accounting and/or motion for repayment of attorneys' fees paid from the Bank of California accounts by, inter alia, consenting to be interviewed and providing truthful information concerning the services rendered in return for those fees and signing a declaration in support of any such motion. A copy of said assignment agreement is attached as Exhibit 4 to this Agreement." [App. 66-67.]

would belong to the client rather than the litigation adversary.) Two extremely well-reasoned California Court of Appeal decisions[8] hold that such assignments are void because they are contrary to public policy. When K&M raised the issue in the District Court, FDIC expressly denied that it was relying upon the assignment provision in the settlement agreement [CR 2644, p. 12], and the District Court agreed [App. 50-51, ¶2]. Accordingly, the District Court made no effort to determine whether FDIC had, on the merits, any enforceable rights against K&M pursuant to the settlement

[8]Jackson v. Rogers & Wells, 210 Cal.App.3d 336, 258 Cal.Rptr. 454 (1989); Goodley v. Wank & Wank, Inc., 62 Cal.App.3d 289, 133 Cal.Rptr. 83 (1976). Significantly, one of the claims held non-assignable in Jackson was based upon an allegation that the attorneys had intentionally performed "unnecessary, unreasonable and improper legal and related services" [210 Cal.App.3d at 346].

agreement.

Rather than determine whether the District Court had jurisdiction to do what it candidly indicated it was doing -- determine FDIC's "rights under the Court's preliminary injunction" [App. 51:10-14] -- which would have required confronting the fact that this court's decision in Gompers v. Bucks Stove & Range Co., 221 U.S. 418 (1911) authoritatively holds that such jurisdiction is lacking following a dismissal, the Court of Appeals held that the District Court had jurisdiction because FDIC and the Ferms had agreed that the District Court would retain jurisdiction to enforce the settlement agreement [App. 5]. Since the proceeding in the District Court was not one to enforce the settlement agreement, the Court of Appeals' jurisdictional rationale does not justify what the

District Court actually did. Moreover, if the proceedings in the District Court had been to "enforce the settlement agreement," this would have required holding FDIC to its promise to dismiss and release all of its unadjudicated claims arising from the action [App. 78-79] and recognizing that the rights purportedly assigned to FDIC under the settlement agreement are unenforceable because such an assignment is illegal and void because it is contrary to public policy. (It is also questionable whether any agreement between FDIC and the Ferms to preserve jurisdiction could be used against K&M because, by requesting this assignment, the FDIC thereby created a conflict of interest between the Ferms and K&M.)

The Memorandum Opinion of the Court of Appeals ignores the important public policy questions presented by K&M's

appeal and handsomely rewards FDIC for deceitfully promising as part of a compromise settlement of litigation it had initiated to dismiss and release all unadjudicated claims arising from the action and then turning around and seeking adjudication of a previously unadjudicated claim.

REASONS FOR GRANTING THE WRIT

(1) The Case Presents Important Questions of Public Policy Which Should be Settled by This Court.

In addition to the comprehensive lack of uniformity between this decision, and all of the over forty decisions addressed in K&M's briefs -- none of which are addressed in the Memorandum opinion by the Court of Appeals -- the

instant case presents questions of exceptional public importance, although the Memorandum does not reach or address them.

As a matter of public policy, the power/right that FDIC asserts to second-guess the "reasonableness" of its legal adversary's attorneys fees is very dubious in a nation that believes in the Anglo-American form of adversary system. The situation here is similar to the deplorable tactic recently condemned by an ethics committee of the Georgia State Bar where a prosecutor negotiated a waiver of defense counsel's claim for attorney's fees as part of a plea bargain [see ABA Journal, May 1993, p. 28]. According to the ABA Journal article, the practice is all too common in settlement negotiations in civil cases involving the federal government. The practice is plainly contrary to public policy because

it allows the government to create a conflict of interest between the citizen being sued by the government and that citizen's attorney. Similar considerations have led the California courts to declare the practice of a litigant's assigning his potential claims against his own attorney as part of a settlement of a civil case to be contrary to public policy.

The instant case presents a vivid example of the danger of this sort of second-guessing. One of the major alleged indicia of "unreasonableness" urged by FDIC was the decision by the Defendants' attorney to attend a number of depositions that had been noticed by FDIC. Permitting this sort of second guessing places the attorney attempting to defend his client against serious claims by the government in an untenable position. If he decides to not attend

the deposition, this will presumably make the legal adversary (FDIC) happy, but this option exposes counsel to potential criticism (conceivably, even a claim for lack of diligent representation) from one's own client. To the extent that there might be a disagreement between FDIC's attorney and one's client as to whether attending the deposition of Witness X is "reasonable" or not, counsel's duty to his own client must be paramount whether the opposing litigant, such as FDIC, likes it or not. This is especially so since it is not at all unusual for a deponent's testimony to turn out to be "surprisingly" more important than one would have anticipated prior to hearing the testimony. Indeed, even if the witness turns out to have little, if anything, worthwhile to contribute, it is a reasonable and permissible professional service to

attend the deposition if only to find out that a potential witness is not important enough to justify calling (or worrying about) at the time of trial. It is also rather hypocritical, and contrary to our society's concept of a citizen's right to the effective assistance of counsel in litigation initiated by the government, to argue that it is "unreasonable" for a defendant's attorney to attend a deposition that has been noticed and is being taken by the government's attorney.

It must be born in mind that the type of case we are speaking of here is one where the federal government is the plaintiff, and the question is what is reasonable to defend against the litigation attack that the government has launched. It may well be that a different rule should obtain where the citizen sues the government, but where the federal government is the litigation

aggressor, allowing the government any power or right to second guess something as vague as the "reasonableness" of the defense strategy treads upon very sensitive ground, for obvious public policy reasons.

Taken to its extreme, what would make a plaintiff happiest is if the defendant has no right to counsel at all, which is obviously against public policy. The right/power that FDIC asserts here is different in degree, but not really in kind. It is just as socially intolerable to allow the government to sue a citizen and then contend that the citizen is only entitled to half (or a third?) as diligent a defense as the citizen and the citizen's attorney consider best. Once the Law allows this sort of second-guessing at all it becomes a virtual impossibility to draw the line. [Some genies need to be kept entirely within

the bottle. In a similar vein, some types of "satellite litigation" are best not sanctioned at all.]

The instant case is only one of what are surely hundreds of cases nationwide where FDIC is compelling citizens to defend themselves against highly aggressive and threatening litigation initiated by FDIC. Although the Memorandum opinion of the Court of Appeals is not published, and cannot be cited as precedent per se, the proceedings here cannot help but encourage FDIC to attempt to engage in similar exercises in second-guessing its litigation adversary's strategy decisions in all of the other cases in which it is involved nationwide. If the second-guessing exercise is contrary to public policy -- and it is certainly questionable, and deserving of serious judicial consideration -- consideration

by this Court would certainly be appropriate. As the May 1993 ABA Journal article suggests, this tactic of attempting to undermine the effectiveness of the assistance of legal counsel received by citizens involved in legal controversies with the federal government appears to be quite widespread.

The instant case also presents a serious question of whether the federal courts can be relied upon to play their historically classic role of protecting American citizens from excesses and abuses by the Executive Branch. The Settlement Agreement entered into by the government here included an unconditional promise by the government to dismiss and release all unadjudicated claims arising from both the Action itself, and the facts giving rise to the action [App. 78-79]. FDIC's rights under the preliminary injunction that the District Court

believed it was entitled to adjudicate had been bargained away (in exchange for the illegal assignment of the Ferms' potential rights against their own attorneys) as part of the settlement process. Since the underlying case had been compromised and dismissed, FDIC had no remaining rights under the preserve-the-status-quo preliminary injunction in any event, since FDIC had no rights whatsoever to any of the moneys in the frozen bank account unless and until it prevailed at trial. (The District Court's belief that it had, in 1987, created some rights in favor of FDIC reflects a fundamental misunderstanding of the nature of a preserve-the-status-quo preliminary injunction.)

When citizens enter into a formal settlement agreement with an agency of the federal government, whereby the agency unconditionally promises and

agrees to dismiss and release all unadjudicated claims arising from the Action itself in addition to the facts giving rise to the action [App. 78-79], and further expressly agrees that the settlement agreement inures to the benefit of the settling defendants' attorneys [App. 84, ¶19], the citizens are entitled to expect the federal government agency's promise to be kept.[9]

If the agency then breaks its promise, the citizens are entitled to expect the federal courts to make the Executive Branch stand by its word, and

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[9]The Court of Appeals' reliance upon events and 1987-vintage "understandings" [App. 5-6] is Legally Irrelevant. The 1990 Settlement Agreement had an integration clause [App. 83-84, ¶18] and an express warranty that FDIC was not relying upon anything said outside of the agreement [App. 80-81, ¶16(b)]. 1987-era statements and understandings are thus irrelevant under the Parol Evidence Rule, which is a rule of substantive law in California [Tahoe Nat. Bank v. Phillips, 4 Cal.3d 11, 22, 92 Cal.Rptr. 704 (1971).

that simply has not occurred here.

(2) The Decisions of the Courts Below Conflict with Applicable Decisions of This Court, and Several Court of Appeals Decisions, Regarding Jurisdiction to Entertain This Sort of Proceeding.

Every federal appellate court has a "special obligation" to satisfy itself of the jurisdiction of the lower court in a cause under review [Bender v. Williamsport Area School Dist., 475 U.S. 534, 541 (1986). This court's major and oft-cited decision in Gompers v. Bucks Stove & Range Co., 211 U.S. 418 (1911) squarely holds that a court's jurisdiction to enforce by civil contempt alleged violations of a preliminary injunction evaporates upon dismissal of

the underlying case. Neither the District Court or the Court of Appeals has published a single word attempting to reconcile their actions with this Court's authoritative Gompers decision. Both have simply ignored the problem and refused to follow controlling precedent (extremely well-settled precedent, no less) established by this court.

The lower courts' refusal to follow Gompers would alone be enough to justify supervisory intervention by this Court, but Gompers hardly stands alone. A long and consistent line of authority holds that, following a voluntary dismissal by the plaintiff, or a stipulated dismissal, the Court loses jurisdiction.

Santiago v. Victim Services Agcy. of Metro. Assist., 753 F.2d 219 (2nd Cir. 1985) seems especially similar to the facts of the instant case. In Santiago, following the hearing on an application

for preliminary injunction, the court denied the preliminary injunction and granted the defendants' motion for leave to submit an application for attorneys fees. A few days thereafter, on June 20, 1983, the plaintiffs filed a notice of voluntary dismissal. Nearly two months later, the defendants brought their motion for an award of attorneys fees, and the motion was eventually granted on February 7, 1984 [753 F.2d at 220-221].

The Court of Appeals reversed the attorneys fee award, observing that once the plaintiff had dismissed the action, the District Court had lost jurisdiction over the action [753 F.2d at 221]. At page 223, the Second Circuit concluded:

> ". . . It is quite plain that the district court lost all jurisdiction over the case when appellants dismissed the action. The court had no

authority to reserve jurisdiction, (Citation), or to attach any conditions to the unilateral right to dismiss."

Of particular interest to the facts of the instant case is the court's discussion, at page 222, of the statement that the trial court had made at the hearing on the attorneys fee award to the effect that it had reserved jurisdiction. The Court of Appeals disagreed, commenting:

"First, the record is barren of any indication that the court reserved jurisdiction over the attorney's fees issue prior to the statement to that effect in the court's February 7, 1984 opinion. Although at the conclusion of the evidentiary hearing on June 8,

> 1983, the court granted appellees' motion for leave to apply for an award of attorney's fees, the notice of dismissal itself, . . . which the court signed on June 17, 1983, made no reference to fees or costs and was completely unconditional. [Emphasis added.]

Similarly, the Stipulation and Dismissal in the instant case is also completely unconditional re any follow-on claim for a refund of previously paid attorneys fees or costs.

Smith v. Phillips, 881 F.2d 902 (10th Cir. 1989) is likewise very instructive. In that case, after a number of the defendants had been dismissed on pleading challenges or summary judgment, the plaintiffs reached

a compromise settlement with the remaining defendants. The parties agreed that the terms of the settlement should be confidential, but the District Court disagreed. After the settling parties had filed a Stipulation for Dismissal, the District Court, sua sponte, ordered that the terms of the settlement be made available to the public, and threatened contempt proceedings.

The Court of Appeals granted writ relief, holding that the Stipulation for Dismissal had divested the District Court of any further jurisdiction, explaining:

> "A voluntary dismissal by stipulation under Rule 41(a)(1)(ii) is of right, cannot be conditioned by the court, and does not call for the exercise of any discretion on the part of the court. (Citations.) Once the

stipulation is filed the action on the merits is at an end. (Citations.) We agree with the Seventh Circuit that "[a]n unconditional dismissal terminated federal jurisdiction except for the limited purpose of reopening and setting aside the judgment of dismissal within the scope allowed by [Fed.R.Civ.P.] 60(b)."

A district court, however, is powerless to condition a dismissal under Rule 41(a)(1)(ii) upon a retention of jurisdiction, and, indeed, it did not attempt to do so in the instant case." [Emphasis added.]

As in Santiago, supra, the Court of Appeals in Smith v. Phillips, supra, held

that, unless expressly reserved in the order of dismissal, what the unexpressed intent of one of the parties, or the court, may have been is irrelevant:

> "The judge next argues that a fair reading of the record disclosed that he did not intend to abandon all jurisdiction in the case by signing the dismissal order. It may be that he did not intend to abdicate jurisdiction, but the filing of the stipulated dismissal with the court ended the case notwithstanding the court's alleged contrary intention."

In Williams v. Ezell, 531 F.2d 1261 (5th Cir. 1976), plaintiffs filed a "Motion for Dismissal" which the Court of Appeals construed as a Rule 41(a)(1)(i)

Notice of Voluntary Dismissal. The District Court denied the "motion" and later made an attorneys fee award in favor of the defendant. The Court of Appeals reversed, commenting:

> ". . . At the time plaintiffs filed their motion to dismiss the case was effectively terminated. The court had no power or discretion to deny plaintiffs' right to dismiss or to attach any condition or burden to that right. That was the end of the case and the attempt to deny relief on the merits and dismiss with prejudice was void. Likewise, except for determining appealability, the subsequent orders granting attorneys fees were a nullity. [531 F.2d at 1263-1264;

emphasis added.]

In Scam Instrument Corp. v. Control Data Corp., 458 F.2d 885, 889 (7th Cir. 1972), the court held that, following a Rule 41(a)(1)(i) voluntary dismissal, ". . . any further action by the district court was neither necessary nor of any effect." [Emphasis added.]

One of the important legal consequences of a dismissal is that it ". . . leaves the situation the same as if the suit had never been brought in the first place." Humphreys v. United States, 272 F.2d 411, 412 (9th Cir. 1959).

In National R. R. Passenger Corp. v. IAMAW, 915 F.2d 43, 48 (1st Cir. 1990), the First Circuit recently explained this legal consequence as follows, citing numerous authorities:

"Of course, it is well

> settled that [t]he effect of a voluntary dismissal without prejudice is to render the proceedings a nullity and leave the parties as if the action had never been brought. (Citations.) This means that the dismissal "carries down with it previous proceedings and orders in the action, and all pleadings, both of plaintiff and defendant, and all issues, with respect to plaintiff's claim." (Citation.)" [Emphasis added.]

In a similar vein, in the oft-cited case of A.B. Dick Co. v. Marr, 197 F.2d 498, 502 (2nd Cir. 1952), the Second Circuit explained the Legal Effect of a dismissal, even when the court had affirmatively denied a motion to vacate a

prior judgment -- the equivalent of the "freeze order" in the instant case -- as follows:

> ". . . But at the same time that the court denied the defendant's petition to vacate and set aside the decree and judgment, it granted the plaintiff's motion to dismiss its entire case and entered an order of dismissal with prejudice. And this action of the court was the equivalent of vacation of the judgment theretofore entered in the case in the plaintiff's favor, so that, perhaps, the court would have been well advised to have entered on its own motion an order vacating that judgment. (Citation.) The reason for this is that voluntary

dismissal of a suit leaves the situation so far as procedures therein are concerned the same as though the suit had never been brought, (Citation), thus vitiating and annulling all prior proceedings and orders in the case, and terminating jurisdiction over it for the reason that the case has become moot. (Citations.)" [Emphasis added.]

See also Bryan v. Smith, 174 F.2d 212, 215, (7th Cir. 1949) where the court observed:

"If the rule is that dismissal leaves the situation as if the suit had never been filed, what right of procedure could possibly stem from something that never existed?

> If this suit had never been brought, how could this ancillary proceeding ever have been started? To ask the question answers it. . . Since the suit had been dismissed, the ancillary proceeding was a nullity." [Emphasis added.]

See also Ford v. Sharp, 758 F.2d 1018, 1023-1024 (5th Cir. 1985) ("If a plaintiff voluntarily dismisses an action without prejudice, it is considered that the suit had never been filed.")

In LeCompte v. Mr. Chip, Inc., 528 F.2d 601, 603, (5th Cir. 1976), the court expressed the rule thusly:

> ". . . The effect of this type of dismissal is to put the plaintiff in a legal position as if he had never brought the first suit."

Given this well-established[10] Legal Effect, since the case has been dismissed as between FDIC and the Ferm Defendants, the District Court is, in legal contemplation, endeavoring to enforce an injunction that is no longer viable.

(3) The Cases Relied Upon by the District Court do not Suffice to Show That the Court has Jurisdiction in the Instant Case.

The District Court's reliance upon League of Women Voters of California v. F.C.C., 751 F.2d 986, 990 (9th Cir. 1985) and Commodity Futures Trading Com'n v. Co Petro Mktg., 700 F.2d 1279, 1282 (9th

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[10]Loeb v. Willis, 100 N.Y. 231, 3 N.E. 177 (1885) -- discussed in Bryan v. Smith, 174 F.2d 212, 214 (7th Cir. 1949) -- is over a century old, which certainly earns this legal principle the status of "well established."

Cir. 1983) is misplaced. Both cases are readily distinguishable. First and foremost, neither case involved an Unconditional Dismissal.

League of Women Voters correctly states a number of familiar rules relating to cases that have been tried and reduced to judgment, but the instant case was resolved by compromise settlement and dismissal of all unadjudicated claims.

We would readily agree that the question of whether the fee payments to K&M were in violation of the preliminary injunction may be regarded as "collateral" to the question of Ms. Ferm's basic liability under FSLIC/FDIC's First Amended Complaint -- provided that it is also recognized that it was an unadjudicated "collateral claim," and therefore had been dismissed by stipulation and Ratifying Order [App. 20-

23].

Moreover, given the Unconditional Dismissal procedural posture that actually evolved in the instant case, the question must be asked: collateral to what? Certainly not to a pending case. As the discussion of the Kiser case in Bryan v. Smith, 174 F.2d 212, 214-215 (7th Cir. 1949) indicates, a court's ability to enforce its prior orders by civil contempt depends upon a pending suit. Accord, Gompers v. Buck Stove & Range Co., 211 U.S. 418, 451-452 (1911). This is a natural corollary of the rule (see Chapter 2, supra) that an unconditional dismissal "carries down" with it the pleadings and orders previously made in the case.

At first glance, the Commodity Futures case may have a superficial appeal as worthwhile precedent since it did involve disgorging a law firm of

funds it had arguably received in violation of a preliminary injunction.

But Commodity Futures is fundamentally different from the instant case. Most fundamentally, the Commodity Futures case did not involve an Unconditional Dismissal. The case was very much still pending, and indeed the District Court had explicitly retained jurisdiction to implement and carry out the terms of its injunctive order [700 F.2d at 1281].

In Commodity Futures, the claimed jurisdictional bar arising from the automatic stay provisions of the Bankruptcy Code was subject to an express exception in the Bankruptcy Code for police or regulatory action. This is the holding of the Commodity Futures case on the "jurisdiction issue." As the cases cited above uniformly demonstrate, there is no comparable "exception" to the loss

of jurisdiction that arises following dismissal of the action.

In its Tentative Ruling of June 24, 1991 [App. 50], the District Court characterized the lesson of the Commodity Futures case as being that a District Court has continuing jurisdiction to enforce the terms of a preliminary injunction by requiring attorneys who receive funds in violation of the injunction to return the funds even though the Court no longer has jurisdiction over the remainder of the action.

That is most emphatically not the holding of the Commodity Futures case. Nowhere in the Commodity Futures opinion is there a holding that the District Court there lost jurisdiction over any portion of the case before it. The actual holding of the Commodity Futures case is precisely to the contrary (i.e.,

that there was no loss of jurisdiction because the case fit squarely within an express exception to the automatic stay) [see 700 F.2d at 1283-1284].

There was no legitimate jurisdictional problem in the Commodity Futures case for yet another reason, though the Commodity Futures opinion does not happen to emphasize it. What was at stake in Commodity Futures was the District Court's jurisdiction over the Loo, Merideth & McMillan law firm. Even if the automatic stay due to the Co Petro Bankruptcy Petition had been applicable, that by no conceivable stretch of the imagination would have stayed the District Court's exercise of jurisdiction over the Loo law firm, because the Loo law firm was not itself in bankruptcy.

In short, the District Court's jurisdiction theory is untenable.

(4) The District Court, Without Appropriate Due Process Advance Notice, Improperly Shifted the Burden of Proof Upon FDIC's Motion.

Historically, during the November of 1987 through October of 1988 era, the only applicable injunctive order was the language at App. 18-19, relating to "reasonable professional statements."

During the November of 1987 through October of 1988 period at issue here, there was **no order in effect** requiring K&M to report its services-rendered by the court-review standards that the District Court has awkwardly -- and probably unconstitutionally -- retroactively imposed upon K&M by its June 24, 1991, Tentative Ruling and August 8, 1991 Order [see App. 40-44; 53-

55].

FDIC had correctly recognized the Legal Significance of the absence of a prior "accounting order" re the 11/87-10/88 era now in question. This is why FDIC's Notice of Motion requested that, if the District Court were of the opinion that a fuller explanation from K&M were in order, the District Court would so advise K&M by making an accounting order re the twelve-month period of 11/87-10/88 [see App. 88-89]. K&M then took FDIC's Notice of Motion at face value, which it was absolutely and positively entitled to do (especially since FDIC had correctly analyzed the situation with respect to who carried the Burden of Proof.)[11]

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[11]Accordingly, K&M "defended" against FDIC's first "alternative" Request for Relief -- which FDIC correctly recognized required it to carry the burden of proof (hence the 178 pages of Moving Papers) -- by simply contending that FDIC had failed to carry its burden of proof. (Any "Calculation," such as the one attempted

Notwithstanding the correct de facto Stipulation between FDIC and K&M re who had the burden of proof, the District Court -- without any prior Notice -- retroactively shifted the Burden of Proof to K&M, and then unfairly criticized K&M for having failed to carry a burden of proof that K&M simply never had (since there had never been a prior "accounting order" re 11/87-10/88, which FDIC had judicially admitted, by its Notice of Motion, was necessary before penalizing K&M for "failing to account.")

Given the "alternative relief"

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by FDIC here, that begins with an "estimate" of fees received [see CR 2635, p. 21] has for all practical purposes failed to carry the burden of proof from the first step. [For different reasons, the District Court found FDIC's arithmetic unsatisfactory; see App. 47, fn. 1.] Also, as K&M noted at the outset, FDIC had proposed an unworkable methodology that could not feasibly be "unwound" if the District Court disagreed with FDIC on any category of charges. See CR 2642, p. 3, lines 4-8.

structure of FDIC's Notice of Motion -- which was correct pleading and properly taken at face value by K&M -- the District Court has, on its own initiative, granted judicial relief that is inconsistent with, and fundamentally in excess of, the judicial relief that FDIC gave Due Process Notice that it was requesting.

It is well-settled that, where there is a lack of proper Due Process Notice, any subsequent judicial orders based thereon are **VOID** -- the proverbial dead limb on the judicial tree. Thos. P. Gonzalez Corp. v. Consejo Nacional, Etc., 614 F.2d 1247, 1256 (9th Cir. 1980); Winhoven v. United States, 201 F.2d 174, 175 (9th Cir. 1952); In re Downtown Inv. Club, 89 B.R. 59, 62-63 (9th Cir. BAP 1988); Wright and Miller, Federal Practice and Procedure, §2862 at Vol. 11, pp. 197-200 (1973).

A District Court simply has neither the power nor discretion to, without advance notice, stand the established law re who has the burden of proof upon a motion or Civil Contempt Proceeding on its head and then penalize a citizen for failing to anticipate such a surprise sua sponte development. The retroactive shifting of the burden of proof becomes especially intolerable when the Civil Contempt character of the proceeding is recognized. It is fundamentally wrong to require an American citizen to prove his innocence.

In addition to, sua sponte, re-defining the Law re who has the Burden of Proof upon a Motion or Civil Contempt Proceeding, the District Court has also thoroughly misconstrued the Legal Significance of the November 1987 to October 1988 Statements that K&M had submitted to its client that FDIC then

disingenuously brought before the District Court as CR 2635, Exh. C at pp. 60-134.

At the time those Statements were prepared, there was no standing Court Order requiring K&M to "report" its services by the more-demanding standards that apply where an attorney intends to make a motion to require the adverse party, in the final analysis, bear both sides' litigation expense.

The fundamental difference between an attorney's Statement to one's own client -- which is ultimately a matter of the private law of contract -- and a Moving Party's efforts to prove-up a motion should be obvious. As Chief Justice Burger perceptively explained in his concurring opinion in the landmark case of Hensley v. Eckerhart, 461 U.S. 424, 441 (1983):

"A claim for legal services

presented by the prevailing party to the losing party pursuant to §1988 presents quite a different situation from a bill that a lawyer presents to his own client. In the latter case, the attorney and client have presumably built up a relationship of mutual trust and respect; the client has confidence that his lawyer has exercised the appropriate 'billing judgment,' ante, at 434, and unless challenged by the client, the billing does not need the kind of extensive documentation necessary for payment under §1988."

The K&M billing statements that FDIC brought before the District Court [CR 2635, Exh. C at pp. 60-134] have never been represented by KUM as being a "court review quality" Statement of Services

Rendered. The District Court, at FDIC's unsound urging, mistreated K&M's Statements to its own client as something that the private Statements were never intended to be. At the time, K&M's only duty was to present a Statement for Services Rendered that satisfied its client's needs; the statements in question served that purpose, which is all that the attorneys' private Statement to its client need (or ever was intended) to accomplish. Hardly any clients want their bills detailed by court-review standards.

If the District Court really believed that 150, or 250, or even 350 pages of Statement is preferable to the 74 pages that were already on the record -- cf. the prudent admonition of the District of Columbia Circuit in Copeland v. Marshall, 641 F.2d 880, 896 (D.C. Cir. 1980) re squandering too much valuable

time and attention on these theoretically collateral attorneys' fees squabbles -- it should have said so, in advance, not retroactively.

The most elementary principles of Due Process require that a District Court must advise a citizen, and afford an Opportunity to be Heard after Notice, before shifting the burden of proof from the moving party on a motion/civil contempt proceeding to the responding party/accused contempt citee -- particulary where, as here, the parties had correctly analyzed the burden of proof in the first place.

Respectfully submitted.

ROBERT L. MEZZETTI

By: _____
ROBERT L. MEZZETTI, Esq.
Attorney for Petitioner

93-202

Supreme Court, U.S.
FILED
JUL 20 1993
OFFICE OF THE CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER 1993 TERM

KURAHARA & MORRISSEY,
Petitioner, Appellant and
Real Party In Interest,

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION,
Respondent, Appellee and
Plaintiff.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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F I L E D
FEB 8, 1993

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION,	)	
Plaintiff-Appellee,	)	No. 91-56423
v.	)	D.C. No. CV-86-6016-AHS
JOHN L. MOLINARO,	)	
Defendant,	)	
and	)	
KURAHARA & MORRISSEY,	)	
Real-Party-In-Interest-Appellant.	)	
FEDERAL DEPOSIT INSURANCE CORPORATION,	)	
Plaintiff-Appellee,	)	No. 91-56212
v.	)	D.C. No. CV-86-6016-AHS
JOHN L. MOLINARO,	)	

Defendant,	
and	
KURAHARA & MORRISSEY,	MEMORANDUM[1]
Real-Party-In-Interest-Appellant.	

Appeal from the United States
District Court
for the Central District of California
Alicemarie H. Stotler,
District Judge, Presiding

Argued and Submitted December 7, 1992
Pasadena, California

Before: BROWNING, SCHROEDER
and FLETCHER, Circuit Judges

During litigation to recover approximately $1.3 million that Kimberleigh Ferm received from her former husband John Molinaro, FDIC began to suspect that Ferm's attorneys, Kurahara & Morrissey (K&M), were charging unreasonable attorney's fees that

*This disposition is not appropriate for publication and may not be cited to or for the courts of this circuit except as provided by 9th Cir. R. 36-3.

threatened to dissipate Ferm's assets despite the presence of a preliminary injunction (approved FSLIC v. Ferm, No. 87-6729, reported in table at 881 F.2d 1083 (9th Cir. 1989)) prohibiting Ferm from spending any money except that needed for living expenses and "reasonable" attorney's fees.

FDIC moved for an order requiring K&M to repay a portion of its fees. The court denied the motion without prejudice to refiling it at the close of the litigation. FDIC then moved for in camera review of K&M's bills to ensure they were reasonable. The court granted the motion and we affirmed. FSLIC v. Ferm, 909 F.2d 372 (9th Cir. 1990).

The parties eventually negotiated a settlement agreement in which Ferm promised to relinquish the disputed funds in return for a release. The district court approved the settlement and entered

judgment. FDIC subsequently dismissed all remaining claims against Ferm. After the court entered judgment, FDIC moved for an order requiring K&M to repay fees that FDIC claimed were excessive. The court granted the motion over K&M's opposition. Before the court issued its final ruling setting the amount to be repaid, K&M moved for an order vacating submission of the motion for repayment and dismissing the proceeding. FDIC opposed the motion and moved for sanctions against K&M.

The district court entered an order requiring K&M to repay $398,011.97 in excessive fees, denied K&M's motion to vacate submission, and ordered K&M to pay $2,975 in sanctions to FDIC. K&M appeals.

I.

The district court had jurisdiction to determine whether K&M's fees were reasonable. Paragraph 2(d) of the settlement agreement explicitly contemplated a motion for repayment of attorney's fees, and paragraph 9 provides, "The court presiding over the Action shall retain jurisdiction to enforce the provisions of this Agreement."

The record supports the conclusion that under the settlement agreement the court's jurisdiction to consider a motion for repayment of fees did not end with the entry of judgment on the merits. K&M opposed FDIC's initial motion for repayment of fees on the ground that addressing the issue of fees during the litigation would undermine the attorney-client relationship between it and Kimberleigh Ferm and claimed the motion must be brought, if at all, at the close

of litigation. The district court denied the motion "without prejudice to refiling it at the conclusion of this litigation." Thus K&M, FDIC, and the court understood any motion for repayment of fees would be brought at the end of proceedings, after judgment had been entered.

II.

We need not decide who bore the burden of proving K&M's fees were reasonable. If K&M bore the burden, it failed to provide sufficient information for the district court to assess the reasonableness of its fees. If FDIC bore the burden, it presented sufficient evidence to establish prima facie that the fee requests were not properly supported. FDIC submitted copies of the Bank of California account statements and K&M's bills, and compiled charts of

inadequately documented and unnecessary fees and costs. K&M offered no evidence to the contrary but simply argued FDIC had failed to meet its burden of proof. On this record, we cannot say the district court's finding that certain of K&M's requests for fees were unreasonable was clearly erroneous.

The district court was not required to order an accounting rather than repayment. Although FDIC moved for an accounting as an alternative, it argued primarily for repayment and did not suggest an accounting was necessary before repayment could be ordered. K&M clearly had notice FDIC sought immediate repayment and requested an accounting only as an alternative fall-back remedy.

III.

Even if the district court had

lacked jurisdiction over the motion for repayment of fees, it would have had jurisdiction to impose sanctions for filing the motion to vacate and dismiss -- a motion that was in effect a motion for reconsideration. See Willy v. Coastal Corp., 112 S.Ct. 1076, 1081 (1992) ("The interest in having rules of procedure obeyed . . . does not disappear upon a subsequent determination that the court was without subject-matter jurisdiction.") However, K&M's filing of such a motion was not sanctionable. It was not improper for K&M to seek reconsideration of a decision that raised several novel issues and imposed severe financial liability on K&M. There is nothing in the record to indicate that K&M filed the motion in bad faith or to delay or to multiply the proceedings. See In Re Grantham Bros., 922 F.2d 1438 (9th Cir. 1991) (objective intent to

delay proceedings will support Rule 11 sanctions); Zambrano v. City of Tustin, 885 F.2d 1473, 1481-83 (9th Cir. 1989) (award of fees under Local Rule 27.1 must be based on finding of bad faith or deliberate violation of court order); Kanarek v. Hatch, 827 F.2d 1389 (9th Cir. 1987) (award of fees under 28 U.S.C. § 1927 must be based on finding of recklessness or bad faith). Moreover, an award of attorney's fees for bad faith conduct may be made "'only in exception cases and for dominating reasons of justice.'" Ass'n of Flight Attendants, AFL-CIO, v. Horizon Air Indus., Inc., 976 F.2d 541, 550 (9th Cir. 1992) (citations omitted).

The judgment in No. 91-56212 is affirmed. The judgment in No. 91-56423 is reversed. Each side will bear its own costs on appeal.

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(Stamp)
F I L E D
NOV 9, 1987

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION,	)	Case No. 86-6016 AHS (Gx)
Plaintiff,	)	STIPULATION TO MODIFY
vs.	)	ORDER OF PRELIMINARY INJUNCTION

JOHN L. MOLINARO, et al., Defendants.	AND ORDER THEREON
AND RELATED CROSS-ACTIONS.	

PREAMBLE

1. The Court on October 19, 1987 granted plaintiff's application for issuance of a preliminary injunction and on October 28, 1987 issued its Order of Preliminary Injunction.

2. The parties hereto agree and petition the Court to allow defendant Ferm to remove funds which she has placed in a safe deposit box at the First Cayman Bank, Cayman Islands, British West Indies, to an account in a California bank so that said may earn interest and the account shall be subject to the Order of Preliminary Injunction.

Now, therefore, plaintiff Federal Savings and Loan Insurance Corporation

("FSLIC") and defendant Kimberleigh L. Ferm (aka Kimberleigh L. Molinaro) by and through her special counsel hereby stipulate as follows:

STIPULATION

The Order of Preliminary Injunction issued by the Court on October 29, 1987 may be modified by the addition thereto of the following paragraph 7:

7. Kimberleigh L. Ferm, in compliance with the Order of Preliminary Injunction, may incur the expense of traveling to the Cayman Islands for the purpose of remitting any funds held by her in a safe deposit box at First Cayman Bank, or any other funds held by her in the Cayman Islands, to accounts in the name of Kimberleigh

L. Ferm at the Bank of California, N.A., Los Angeles branch. The reasonable expenses incurred by Kimberleigh L Ferm in (a) making such a trip and (b) remitting any funds so deposited by wire transfer to The Bank of California may be paid from any monies owed by Ferm. The account into which such funds are deposited at The Bank of California, N.A. shall be in the name of Kimberleigh L. Ferm, but provided that (1) Ferm shall place up to $100,000 in a money market checking account and the balance of any funds into one or more Certificates of Deposit which are short term (not to exceed 180 days), non-negotiable, non-transferable, with interest credited to the Certificate at maturity and automatically

renewable (although the renewal terms) with one or more of such certificates to be available at their normal maturity to replenish the checking account so that the balance after authorized withdrawals shall not fall below $20,000 and the account shall be maintained with a balance in the range from $20,000 as a low and $100,000 as a high and (2) Ferm shall be entitled to draw or pay from such checking account only the following amounts without further Court order: (a) sums not to exceed $5,000 a month to pay reasonable living expenses; and (b) the payment of reasonable professional statements submitted by Ferm's counsel for the representation of her interests in this action. Any further

disbursement from such checking account, such as for state or federal taxes or emergency or extraordinary expenses incurred by Kimberleigh L. Ferm, shall be as authorized by the Court upon the stipulation of the parties or upon ex parte or noticed application or after final judgment on the merits pertinent to the moneys in such account. The monthly statements for such account shall be submitted to the Bank to Kimberleigh L. Ferm, her counsel and plaintiff's counsel. A copy of this order may be served on The Bank of California, N.A., Los Angeles Branch but that Bank shall not be responsible for monitoring or limiting withdrawals from Ferm's

//

//

account.

LAWLER, FELIX & HALL
RICHARD L. FRUIN, JR.
MARK S. LEE

November 4, 1987

By: (Signature)
Richard L. Fruin, Jr.
Attorneys for
Plaintiff Federal
Savings and Loan
Insurance Corporation

KURAHARA & MORRISSEY
MICHAEL MORRISSEY

November 3, 1987

By: (Signature)
Michael Morrissey
Attorneys for
Kimberleigh L. Ferm

ORDER

Upon the stipulation of plaintiff and defendant Kimberleigh L. Ferm, the Order of Preliminary Injunction issued after hearing on October 19, 1987 is modified by the addition of the following

paragraph thereto:

7. Kimberleigh L. Ferm, in compliance with the Order of Preliminary Injunction, may incur the expense of traveling to the Cayman Islands for the purpose of remitting any funds held by her in a safe deposit box at First Cayman Bank, or any other funds held by her in the Cayman Islands, to accounts in the name of Kimberleigh L. Ferm at The Bank of California, N.A., Los Angeles branch. The reasonable expenses incurred by Kimberleigh L Ferm in (a) making such a trip and (b) remitting any funds so deposited by wire transfer to The Bank of California may be paid from any monies owed by Ferm. The account into which such funds are deposited at The Bank of California, N.A. shall be in the name of Kimberleigh L. Ferm, but provided that (1) Ferm shall place up to $100,000 in a money market checking account and the

balance of any funds into one or more Certificates of Deposit which are short term (not to exceed 180 days), non-negotiable, non-transferable, with interest credited to the Certificate at maturity and automatically renewable (although the renewal terms) with one or more of such certificates to be available at their normal maturity to replenish the checking account so that the balance after authorized withdrawals shall not fall below $20,000 and the account shall be maintained with a balance in the range from $20,000 as a low and $100,000 as a high and (2) Ferm shall be entitled to draw or pay from such checking account only the following amounts without further Court order: (a) sums not to exceed $5,000 a month to pay reasonable living expenses; and (b) the payment of reasonable professional statements submitted by Ferm's counsel for the

representation of her interests in this action. Any further disbursement from such checking account, such as for state or federal taxes or emergency or extraordinary expenses incurred by Kimberleigh L. Ferm, shall be as authorized by the Court upon the stipulation of the parties or upon ex parte or noticed application or after final judgment on the merits pertinent to the monies in such account. The monthly statements for such account shall be submitted to the Bank to Kimberleigh L. Ferm, her counsel and plaintiff's counsel. A copy of this order may be served on The Bank of California, N.A., Los Angeles Branch but that Bank shall not be responsible for monitoring or limiting withdrawals from Ferm's account.

Dated: November 9, 1987

Signature
Alicemarie H. Stotler
United States District Judge

ARTER, HADDEN, LAWLER, FELIX & HALL
RICHARD L. FRUIN, JR.
EDWIN W. DUNCAN
MARK S. LEE - State Bar No. 94103
J. MICHAEL ECHEVARRIA
700 South Flower Street, 30th Floor
Los Angeles, California 90017

Attorneys for Plaintiff
Federal Deposition Insurance
Corporation as Manager for the
FSLIC Resolution Fund

(Stamp)
F I L E D
MAR - 6 1991

(Stamp)
E N T E R E D
MAR 7 1991

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FEDERAL DEPOSIT INSURANCE CORPORATION AS MANAGER FOR THE FSLIC RESOLUTION FUND,	)	Case No. 86-6016 AHS (Gx)
Plaintiffs,	)	STIPULATION AND ORDER FOR DISMISSAL OF UN-ADJUDICATED CLAIMS PURSUANT TO FEDERAL RULE
vs.	)	

JOHN L. MOLINARO, et al., Defendants.	)	OF CIVIL PROCEDURE 41(A)
AND RELATED CROSS-ACTIONS.	)	

Plaintiff Federal Deposit Insurance Corporation as Manger of the FSLIC Resolution Fund ("FDIC"), and defendants Kimberleigh Ferm and Lavonne Ferm having entered into a settlement agreement; the Court have entered judgment pursuant to that settlement on December 7, 1990 with regard to a certain parcel of real property commonly known as the "Calcaterra Court" property only; said the Court having entered an order declaring the parties settlement agreement to be in good faith on or about February 4, 1991;

IT IS STIPULATED BETWEEN THE PARTIES that all unadjudicated claims contained in FDIC's first amended complaint,

together with all amendments and supplements thereto, shall be dismissed with prejudice as to defendants Kimberleigh and Lavonne Ferm. Said dismissal shall not affect the December

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7, 1990, judgment described above.

DATED: February 22, 1991.

ARCHER, HADDEN,
LAWLER,
FELIX & HALL
RICHARD L. FRUIN, JR.
EDWIN W. DUNCAN
MARK S. LEE
J. MICHAEL ECHEVARRIA

By: (Signature)
Mark S. Lee
Attorneys for
Plaintiff
Federal Deposit
Insurance
Corporation as
Manager for the
FSLIC Resolution
Fund

DATED: February 27, 1991.

KURAHARA & MORRISSEY

By: (Signature)
Michael T. Morrissey
Attorneys for
Defendants
Kimberleigh and
Lavonne Ferm

IT IS SO ORDERED

DATED: MAR - 6 1991

(Signature)
UNITED STATES DISTRICT JUDGE

(Stamp)
E N T E R E D
AUG 8 1991

(Stamp)
F I L E D
AUG - 7 1991

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FEDERAL DEPOSIT INSURANCE CORPORATION AS MANAGER FOR THE FSLIC RESOLUTION FUND,	)	Case No. 86-6016 AHS (Gx)
Plaintiffs,	)	ORDER TO REPAY UNREASONABLY INCURRED ATTORNEYS FEES AND COSTS
vs.	)	
JOHN L. MOLINARO, et al.,	)	(Stamp) **THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(d)**
Defendants.	)	

I. FACTS AND PROCEDURAL BACKGROUND

In this action, FDIC alleged that defendant John Molinaro and others, including defendant Kimberleigh Ferm, engaged in a series of fraudulent schemes to loot the assets of no defunct Ramona Savings & Loan Association. Specifically, plaintiff alleged that Molinaro fraudulently transferred funds illegally obtained from the bankrupt Ramona Savings to conceal those funds from the FDIC, as successor to FSLIC. When the FDIC amended its complaint on May 5, 1987, it named defendant Ferm as one of the alleged fraudulent transferees.

Defendant Ferm retained the law firm of Kurahara and Morrissey ("K&M) to represent her against two claims of the 42 counts alleged in the First Amended Complaint. Counts 31 and 32 alleged that defendant Ferm was liable for

certain fraudulent conveyances and conspiracy to conceal those fraudulent conveyances. The allegations were based on documents seized from Molinaro at the time of his arrest. The documents indicated that Molinaro and Ferm concealed millions of dollars in various banks in the Cayman Islands.

On October 28, 1987, the court issued a preliminary injunction freezing Ferm's assets during the pendency of the FDIC's actions against her. Two weeks later, on November 9, 1987, the Court modified the preliminary injunction pursuant to a stipulation of the parties. The stipulation allowed Ferm to return to the Cayman Islands to obtain the fraudulently transferred funds. The stipulation further provided that the funds were to be placed on deposit with The Bank of California. From that fund, Ferm was permitted to withdraw $5,000.00

a month for a living allowance and the amount needed to pay her attorneys "reasonable" fees. See Moving Papers, Exhibit A.

Pursuant to the stipulation, approximately $1.3 million of Ferm's was returned to the United States and placed on deposit with the Bank of California. However, the FDIC soon became concerned that Ferm was dissipating the frozen funds by making payments to recover her excessive attorneys' fees. For example, K&M received approximately $400,000.00 from the frozen funds in the five months immediately following the Court's Order modifying the injunction. FDIC responded by filing a motion for an accounting and an Order requiring repayment of fees determined by the Court to be unreasonable. On June 1, 1988, however, the Court denied plaintiff's motion "without prejudice to refiling at the

conclusion of this litigation."

K&M continued to receive massive sums of money for the legal services during the four months following the Court's denial of the first Motion for an Accounting of Fees. Accordingly, the FDIC brought a second accounting motion based on allegedly excessive fee withdrawals made after April 29, 1988, the filing date for its first accounting motion.n the FDIC's second motion, the FDIC simply requested the Court to conduct a confidential review of M&M's fee requests. On December 27, 1988, the Court granted FDIC's motion and further modified the injunction to require K&M to submit to the Court all invoices for legal services and expenses rendered in connection with Ferm's defense. The invoices were to be submitted under seal for an in camera review to determine whether the firm's fees were reasonable.

See generally Federal Savings & Loan Insurance Corp. v. Ferm 909 F.2d 372 (9th Cir. 1990).

Before the Court's Accounting Order was entered to restrict Ferm's access to the disputed funds, however, K&M received, by plaintiff's calculations, a total of $722,733.31 from the frozen funds during the period between November 1, 1987 and November 30, 1988. Hence, because the litigation has now reached a conclusion, the FDIC, on April 12, 1991, filed a Motion for an Order Requiring Repayment of Fees and Costs. The motion is directed to those funds paid to satisfy K&M's "unreasonable" fee requests, which plaintiff contends amount to $581,680.42 (Moving Papers, at 2) or $581,740.82 (id. at 3). K&M applied ex parte for, and obtained over objection, a postponement from May 6 to June 24 for the hearing. On June 11, 1991, K&M Filed

opposition. Plaintiff filed its Reply Brief on June 17, 1991.

On June 24, 1991, the matter can on regularly for hearing. In the Court's Tentative Ruling, the Court ruled that it had continuing jurisdiction to adjudicate plaintiff's motion and determined that the motion was well taken. A copy of the Tentative Ruling is attached to this Order. However, the Court took the matter under submission so that it could evaluate K&M's billing statements (attached as Exhibit C to plaintiff's motion) with greater care.

Having now completed its study, the Court determines as indicated below that $184,982.00 constitutes a reasonable fee for the services performed by the law firm of K&M. Accordingly, since the total fees for the "Actual Time" expended is $533,433.50 (see Motion Papers, Exhibit C; Motion Papers, at 15), the

Court determines that $348,451.00 constitutes the total fees unreasonably incurred. The Court further determines that $49,560.97 constitutes the total amount of costs unreasonably incurred by K&M.

II. DISCUSSION

A. Reasonableness of Hours Expended

As noted in the Court's Tentative Ruling, when determining the amount of a reasonable attorneys' fee, the federal courts use the lodestar/multiplier approach adopted by the Supreme Court in Hensley v. Eckerhart, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). The "lodestar" approach involves a two-step analysis. "First, the Court must determine a 'lodestar' amount by multiplying the number of hours reasonably expended on the litigation by

a reasonable hourly rate. Second, the Court may increase or decrease the lodestar fee based on factors identified by [the Ninth Circuit] in Kerr v. Screen Extras Guild, Inc., 526 F.2d 67, 70 (9th Cir. 1975), that are not subsumed within the initial calculation of the lodestar." D'Emanuele v. Montgomery Ward & Co., Inc., 904 F.2d 1379, 1383 (9th Cir. 1990).

Because the Court has already concluded that "the rates claimed for partners, associates, legal assistants, and law clerks are . . . reasonable," (see Tentative Ruling, Paragraph 4), the Court's present focus is on the reasonableness of the hours allegedly expended on behalf of Ms. Ferm's defense. The Court's calculations are as follows:

Michael T. Morrissey:

Inadequately Documented Hours	=	567.1
Unnecessary Time	=	149.5
Excessive Time	=	56.5
TOTAL	=	773.1

hours

Actual Time:	1,028.8
Unreas. Time:	773.1
Reas. Time	225.7 hours

(11/87-5/88)

127.9 hours X $150/hour = $19,185.00

(5/88-11/88)

127.9 hours X $200/hour = $25,580.00

TOTAL = $44,765.00

Jan Y. Kurahara:

Inadequately Documented Hours	=	386.1
Unnecessary Time	=	196.6
Excessive Time	=	131.2
TOTAL	=	713.9

hours

Actual Time: 943.4

Unreas. Time: 713.9

Reas. Time 229.5 hours

(11/87-5/88)

114.8 hours X $150/hour = $17,220.00

(5/88-11/88)

114.8 hours X $200/hour = $22,960.00

TOTAL = $40,180.00

Sharon Cortright:

Inadequately Documented Hours = --

Unnecessary Time = 11

Excessive Time = --

TOTAL = 11.0

hours

Actual Time: 11.0

Unreas. Time: 11.0

Reas. Time 00.0 hours

(11/87-5/88)

00.0 hours X $125/hour = $0.00

(5/88-11/88)

00.0 hours X $150/hour = $0.00

TOTAL = $0.00

Cynthia B. Neuenschwander:

Inadequately Documented Hours	=	18.6
Unnecessary Time	=	60.4
Excessive Time	=	31.0
TOTAL	=	110.0

hours

Actual Time:	305.7
Unreas. Time:	110.0
Reas. Time	195.7 hours

(11/87-5/88)

97.9 hours X $120/hour = $12,237.50

(5/88-11/88)

97.9 hours X $150/hour = $14,685.00

TOTAL = $26,922.00

James Mazzco:

Inadequately Documented Hours	=	7.5
Unnecessary Time	=	--
Excessive Time	=	--
TOTAL	=	7.5

hours

Actual Time: 38.5

Unreas. Time: 7.5

Reas. Time 31.0 hours

(11/87-5/88)

97.9 hours X $120/hour = $1,937.50

(5/88-11/88)

97.9 hours X $150/hour = $2,325.00

TOTAL = $4,262.50

Legal Assistants:

Inadequately Documented Hours	=	34.6
Unnecessary Time	=	47.5
Excessive Time	=	233.85
"Routine Time"	=	1.1
TOTAL	=	317.1

hours

Actual Time: 742.0

Unreas. Time: 371.1

Reas. Time 424.9 hours

424.9 hours X $100/hour = $42,490.00

Law Clerks:

Inadequately Documented Hours	=	73.8
Unnecessary Time	=	--
Excessive Time	=	46.75
"Routine Time"	=	438.9
TOTAL	=	559.5

hours

Actual Time: 911.0

Unreas. Time: 55935

Reas. Time 351.50 hours

351.5 hours X $100/hour = $26,362.50

TOTAL REASONABLE FEES = $184,982.00

TOTAL FEES ("Actual Time") = $533,433.50

TOTAL REASONABLE FEES = $184,982.00

UNREASONABLE FEES = $389,451.50

As can be seen from the Court's calculations, the Court has essentially adopted plaintiff's analysis of K&M's billing statements. While this may deprive K&M of some legitimate fees, K&M's scant opposition has left the Court with no choice under the governing law. Under Jordan v. Multnomah County, 815 F.2d 1258, 1263 (9th Cir. 1987), "[t]he fee applicant has the burden of producing satisfactory evidence, in addition to the affidavits of its counsel, . . . that the claimed rate and number of hours are reasonable." It is not sufficient for the fee applicant to opine that all of the time claimed was reasonably spent; rather, the applicant must submit records sufficiently detailed that a neutral judge can make a fair evaluation of the time expended and the nature and need for the services provided. Id. In this case, however, K&M has failed to provide

any adequate documentation or justification for the hours expended on behalf of Ms. Ferm.

With respect to the numerous depositions attended by K&M attorneys, for example, K&M has failed to carry its burden of justifying the legal fees charged. K&M makes no attempt to list the deponents and explain their relevance to Ferm's case. Indeed, K&M's billing statements include numerous entries for "depositions" and related preparation without even identifying the subject deponents. Furthermore, K&M's opposition provides no response to plaintiff's contention that K&M attended many depositions for the purpose of representing defendant John Molinaro's interests. For instance, although K&M could have easily refuted plaintiff's contention by showing that Molinaro's attorney also attended the depositions,

K&M never made such a showing. Consequently, the Court is left to speculate as to the propriety and reasonableness of K&M's participation in unspecified and ostensibly irrelevant discovery proceedings.

Similarly, K&M's billing statements inadequately document the countless hours spent on "legal research." The billing statements do not offer any indication as to why the legal research was conducted. For example, although K&M's personnel could have easily done so, they failed to relate K&M's legal research to any particular Court hearings, motions, or issues relevant to plaintiff's claims against Ms. Ferm. Despite the continuance granted on April 22, 1991 to provide K&M additional time to prepare its opposition to the instant motion, K&M's opposition is no more enlightening.

In light of these failings, the

Court is left with no choice but to disallow all of the challenged billing entries. While the Court contemplate disallowance of a given percentage of the challenged fees rather than a total disallowance, it is clear that such an approach would be invalid. The Court cannot arbitrarily slash or increase the number of hours reasonably incurred simply to achieve an what appears to be an ostensibly fair fee calculation. See D'Emanuele, 904 F.2d at 1385. Rather, the Court is obligated to find that the claimed fees are sufficiently documented and reasonably incurred. Id. at 1385-87. In this case, however, K&M has deprived the Court of its ability to make an independent determination of the reasonableness of their efforts. Accordingly, because K&M have failed to document or otherwise justify the challenged fees, the challenged fees

cannot be retained.

As noted in the Court's Tentative Ruling, this result may seem harsh, but the Court does not have any documentary evidence sufficient to support any other disposition. Moreover, "the fact remains that K&M knew that it was receiving funds from an account under Court control and supervision. Accordingly, K&M was on notice that it would eventually have to explain and justify its billing statements." See Tentative Ruling, Paragraph 5.

B. Unreasonable Costs

The Court concludes that $49,560.97 constitutes unreasonable costs based on the following calculations:

1.	Unexplained "cash/expenses"	$2,460.00
2.	Unexplained taxi/car rentals	$975.67
3.	Court Reporter Fee	(justified)
4.	Margin Giant Loan	$7,841.50
5.	Unexplained Limousine Rental	$201.60
6.	Mezzetti Consulting Fees	(justified)
7.	Lavonne Ferm Payment	$200.00
8.	Non-Ferm Deposition Transcripts	$8,001.00
9.	L.A. Travel and Expenses	$804.00
10.	Cayman Islands Expenses (justified but excessive)	$3,000.00
11.	Econ. & Fin. Expert C. Harper	$10,350.00
12.	Real Estate Appraisers	$15,727.20
TOTAL UNJUSTIFIED COSTS =		$49,560.97

Again, as can be discerned from the above calculations, the Court has

disallowed many of the costs challenged by plaintiff's motion due to K&M's failure to provide adequate documentation or justification for such costs. In opposition, K&M provides only limited explanations for some of the costs challenged by plaintiff. For example, while K&M explains that the $7,841.50 paid to "Marvin Giant Loan" was incurred due to a large document copying job, K&M makes absolutely no attempt to explain the "need for [such] services." Similarly absent from the record is any explanation for the need and relevance of the real estate appraisal and financial consultant fees. Accordingly, K&M may not properly retain the costs listed above.

III. CONCLUSION

The Court grants plaintiff's Motion

for Order Requiring Repayment of Fees and Costs. Accordingly, K&M is directed to repay the sum of $398,011.97[1] in unreasonable fees and costs by redepositing that sum into Bank of California Account No. 032-366474 within

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[1] While the Court agrees with plaintiff's contention regarding the inadequacy of K&M's fee documentation and the unreasonableness of the claimed fees, the Court's calculations have yielded a different sum of unreasonable fees. The Court deviates from plaintiff's calculations because, in the Court's view, plaintiff's fee calculations have no relation to the "Actual Time" expended by K&M personnel. Although plaintiff calculated the "remaining reasonable hours" by subtracting the unreasonable hours from the "actual" hours, plaintiff apparently obtained the claimed total of unreasonable fees by subtracting the total number of reasonable fees and costs from the $722,733.31 allegedly extracted by K&M during the months in issue. However, when the Court attempted to use $722,733.31 as a reference figure, the Court's calculations of a reasonable fee and unreasonable fee produced inconsistent results. Accordingly, the Court calculated the fees by reference to the total fees charged, which was derived by multiplying the "Actual Time" expended by the applicable hourly rates. See Moving Papers, at 12 and 15.

60 days of the date of this Order.

TOTAL AMOUNT SUBJECT TO REPAYMENT:

TOTAL UNREASONABLE FEES	=	$348,451.00
TOTAL UNJUSTIFIED COSTS	=	$49,560.97
TOTAL	=	$398,011.97

IT IS SO ORDERED.

IT IS FURTHER ORDERED that the Clerk shall serve a copy of this Order on counsel for all parties.

DATED: August 6, 1991.

(Signature)
ALICEMARIE H. STOTLER
UNITED STATES DISTRICT JUDGE

cc: Richard L. Fruin, Jr.
Edwin W. Duncan
Mark S. Lee
J. Michael Echevarria
ARTER, HADDEN, LAWLER, FELIX & HALL
700 South Flower St., 30th Flr.
Los Angeles, CA 90017

Michael T. Morrissey
KURAHARA & MORRISSEY
1871 The Alameda, Ste. 450
San Jose, CA 95126

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

THE HONORABLE ALICEMARIE H. STOTLER,
JUDGE, PRESIDING

TENTATIVE RULING ON LAW & MOTION MATTERS

June 24 1991 Calendar No. 1

CASE: F.D.I.C. V. JOHN F. MOLINARO, et al.

SA CV 86-6016-AHS (RWRx)

MOTION(S) PENDING: Plaintiff's Motion for Order Requiring Repayment of Unreasonable Fees and Costs or, Alternatively, Requiring an Accounting by Kimberleigh Ferm's Attorneys

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1. The Court grants plaintiff's Motion for Order Requiring Repayment of Unreasonable Fees and Costs. It is well established that district courts "retain jurisdiction to rule upon a request for attorney fees, . . . [and may do so] at a

point substantially beyond entry of final judgment." League of Women Voters of California v. F.C.C., 751 F.2d 986, 990 (9th Cir. 1985). In addition, a district court has continuing jurisdiction to enforce the terms of a preliminary injunction by requiring attorneys who receive funds in violation of the injunction to return the funds even though the court no longer has jurisdiction over the remainder of the action. See Commodity Futures Trading Commission v. Co Petro Marketing Group, Inc., 700 F.2d 1279, 1282 (9th Cir. 1983). Hence, the fact that the FDIC's claims against defendant Ferm have been dismissed with prejudice does not deprive the Court of jurisdiction to determine whether her attorneys received fee payments in excess of those authorized by the Court's injunction.

2. The Court rejects Kurahara &

Morrissey's ("K&M") argument that FDIC's entitlement to recovery of excessive fees is based on the assignment provisions contained in the parties' settlement agreement. The FDIC's motion is not predicated upon the contention that the FDIC is entitled to repayment of the excessive fees because it is an assignee of Ferm's right to use K&M for malpractice. The FDIC's motion is brought to enforce its rights under the Court's preliminary injunction freezing Ferm's assets for the benefit of the FDIC pending resolution of this action. Accordingly, K&M's reliance on Goodley v. Wank & Wank, Inc., 62 Cal. App. 3d 389, 133 Cal. Rptr. 83 (1976) (holding that legal malpractice claims were not assignable); Jackson v. Rogers & Wells, 210 Cal. App. 3d 336 (1989), is misplaced.

3. In determining the amount of a

reasonable attorneys' fee, the federal courts use the lodestar/multiplier approach adopted by the Supreme Court in Hensley v. Eckerhart, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). The "lodestar" approach involves a two-step analysis. "First, the Court must determine a 'lodestar' amount by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate. Second, the Court may increase or decrease the lodestar fee based on factors identified by [the Ninth Circuit] in Kerr v. Screen Extras Guild, Inc., 526 F.2d 67, 70 (9th Cir. 1975), that are not subsumed within the initial calculation of the lodestar." D'Emanuele v. Montgomery Ward & Co., Inc., 904 F.2d 1379, 1383 (9th Cir. 1990).

4. Reasonable Hourly Rate: The Court does not find that the rates

claimed for partners, associates, legal assistants, and law clerks are other than reasonable.

5. Hours and Costs Unreasonably Expended: Under Jordan v. Multnomah County, 815 F.2d 1258, 1263 (9th Cir. 1987), "[t]he fee applicant has the burden of producing satisfactory evidence, in addition to the affidavits of its counsel, . . . that the claimed rate and number of hours are reasonable." It is not sufficient for the fee applicant to opine that all of the time claimed was reasonably spent; rather, the applicant must submit records sufficiently detailed that a neutral judge can make a fair evaluation of the time expended and the nature and need for the services provided. Id K&M's ex parte application to continue the hearing for two months on the ground of additional time was needed to respond was

granted on April 22, 1991.

In this case, however, K&M provide limited explanations of only a few entries for fees and costs challenged by the FDIC. K&M's explanations do not provide any basis for determining that the challenged costs and fees were expended reasonably on behalf of defendant Ferm. For example, while K&M explains that the $7,841.50 paid to "Marvin Giant Loan" was incurred due to a large document copying job, K&M make absolutely no attempt to explain the "need for [such] services." As such, the Court concludes that K&M cannot properly retain such unjustified fees and costs. While this may see harsh, the fact remains that K&M knew that it was receiving funds from an account under Court control and supervision. Accordingly, K&M was on notice that it would eventually have to explain and

justify its billing statements.

6. After the hearing, the Court will modify, sign and file plaintiff's Proposed Order to Repay Attorneys' Fees and Costs.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

(Stamp)
F I L E D
APR 21 1993

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION,	)	
Plaintiff-Appellee,	)	No. 91-56423
v.	)	D.C. No. CV-86-6016-AHS
JOHN L. MOLINARO,	)	
Defendant,	)	
and	)	
KURAHARA & MORRISSEY,	)	
Real-Party-In-Interest-Appellant.	)	
FEDERAL DEPOSIT INSURANCE CORPORATION,	)	
Plaintiff-Appellee,	)	No. 91-56212
v.	)	D.C. No. CV-86-6016-AHS

JOHN L. MOLINARO, Defendant, and KURAHARA & MORRISSEY, Real-Party-In-Interest-Appellant.	ORDER

Before: BROWNING, SCHROEDER and FLETCHER, Circuit Judges.

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

SETTLEMENT AGREEMENT AND RELEASE

THIS SETTLEMENT AGREEMENT AND RELEASE ("Agreement") is made as of this 21st day of ~~July~~ 1990, by and among the Federal Deposit Insurance Corporation ("FDIC") on the one part, and Kimberleigh Ferm and LaVonne Ferm (the "Ferms") on the other part.

R E C I T A L S

A. Ramona Savings and Loan Association, a California corporation ("Ramona"), was a state-chartered savings and loan association whose deposits were insured by the Federal Savings and Loan Insurance Corporation.

B. On September 12, 1986, the Federal Home Loan Bank Board ("Bank Board") placed Ramona into receivership and appointed the Federal Savings and Loan Insurance Corporation as Ramona's receiver.

C. On September 12, 1986, the Federal Savings and Loan Insurance Corporation in its capacity as Ramona's receiver assigned and transferred to the Federal Savings and Loan Insurance Corporation in its corporate capacity ("FSLIC") certain assets, including all claims and causes of action against Ramona's officers, directors, control persons and others.

D. On September 16, 1986, FSLIC commenced an action in the United District Court, Central District of California, entitled Federal Savings and Loan Insurance Corporation v. John L. Molinaro, et al., Case No. 86-6016 AHS (Gx), which complaint has been amended and supplemented from time to time (the "Action"). The complaint, as amended and supplemented, names the Ferms as defendants.

E. The FDIC, with the enactment

into law of the Financial Institutions Reform, Recovery and Enforcement Act on August 9,1 989, succeeded FSLIC as receiver for Ramona and as plaintiff in the Action;

F. FDIC and the Ferms intend by this Agreement to settle all claims by the FDIC against them arising out of or related to: (1) the Action, (2) the events giving rise to the Action, (3) the Ferms' conduct in conjunction with Ramona, if any, (4) the transfers of assets by John L. Molinaro ("Molinaro") or inter se among the Ferms and (5) the operations of Ramona.

NOW, THEREFORE, in consideration of the foregoing and mutual covenants hereinafter contained, the FDIC and the Ferms agree as follows:

1. This Agreement shall become effective (the "Effective Date") on the date that the court in the Action enters

an order in accordance with California Code of Civil Procedure §§ 877 and 877.6 determining that the settlement between the FDIC, on the one hand, and the Ferms, on the other hand, is in good faith, and dismisses the Action as to the Ferms. The Ferms not later than July 15, 1990 shall prepare and serve and serve a motion seeking judicial determination. On the Effective Date, the FDIC shall request a dismissal of the Action against the Ferms pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure. On the Effective Date, the Ferms shall move the court to dismiss any and all appeals, claims, cross-claims, counterclaims, and/or third party complaints that they have pending against the FDIC or Federal Savings & Loan Insurance Corporation ("FSLIC") in their corporate or receivership capacity, Federal Home Loan Bank Board ("FHLBB"), Federal Home Loan

Bank ("FHLB") of San Francisco, or their successors or assigns, or any agent or employee of those entities.

2. The Ferms, for the purpose of reaching settlement, have disclosed to the FDIC all assets, claims, entitlements and choses in action (collectively "assets") that are directly or beneficially owned by any of them, together with their best estimate of each asset's value. The Ferms' asset disclosure and value estimates are set forth in Exhibit 1. In settlement of the FDIC's claims against them, the Ferms shall transfer to the FDIC those assets identified in subparagraph (a) through (e) herein and provide the other consideration herein described. Said transfers shall be made as follows:

(a) The Ferms shall pay to the FDIC the sum of $_____, which sum represents the total balances in those

certain bank accounts designated Nos. 032-366474 and 103-0000099728 located at the Bank of California and identified in paragraph 6 below (the "BankCal Accounts") together will sums in that certain trust account held at the law offices of Kurahara & Morrissey pursuant to an order of court entered December 27, 1988, to be paid by certified check or checks delivered to the FDIC's counsel on the date provided in paragraph 6 of this Agreement. FDIC agrees to execute joint instructions to the Bank of California directing it to release the BankCal accounts in the manner described in this paragraph. The Ferms also assign to FDIC all right, title and interest to any and all further sums which may be paid into those accounts. FDIC's counsel shall hold those funds in trust until such time as the court rules on the good faith motion described in paragraph 1 above

pursuant to the provisions of paragraph 6 below.

(b) The Ferms shall transfer the quitclaim deed all right, title and interest in the Calcaterra Court property identified in Exhibit 1 on the date provided in paragraph 6 of this Agreement. FDIC agrees to evaluate title to the Calcaterra Court property at its own expense by no later than the Effective Date. Should FDIC be dissatisfied with the condition of the title, it may in its sole discretion declare this Agreement null, void and of no force and effect; affirm this Agreement and elect to retain the Calcaterra Court property; or negotiate an amendment to the Agreement. The Ferms also agree to cooperate as requested by the FDIC in its efforts to obtain title to the Calcaterra Court property clear of any liens or encumbrances, including but

not limited to liens by the Franchise Tax Board by, inter alia, entering into a stipulated judgment of the type attached as Exhibit 2 to this Agreement establishing FDIC's right to the Calcaterra Court property, stipulating to the priority of FDIC's claim to that property, assisting the FDIC in any motion to establish the priority of FDIC's claim to that property, and/or signing such other documents which contain truthful information or taking such other actions as FDIC deems necessary to establish the priority of its right to that property.

(c) The Ferms shall transfer and assign to the FDIC, or to its agent, all right, title and interest they, or either of them, have as a creditor for that certain loan of $60,000 made to Sharon Molinaro, as identified in Exhibit 1 on the date provided in paragraph 6 of

this Agreement. A copy of the assignment is attached as Exhibit 3 to this Agreement.

(d) The Ferms shall transfer and assign all right, title and interest they have in any claims or choses in action against Kurahara & Morrissey or any member or employee thereof, hereby waive the attorney client and attorney work product privileges with regard to all sums paid to Kurahara & Morrissey from the BankCal Accounts, agree to provide to FDIC within seven days of the effective date copies of all retainer agreements and amendments thereto and all invoices for fees and costs received from Kurahara & Morrissey which are in their possession, and agree to cooperate with FDIC in any motion for accounting and/or motion for repayment of attorneys' fees paid from the Bank of California accounts by, inter alia, consenting to be

interviewed and providing truthful information concerning the services rendered in return for those fees and signing a declaration in support of any such motion. A copy of said assignment agreement is attached as Exhibit 4 to this Agreement.

(e) The Ferms shall transfer to the FDIC within seven (7) days after discovery by the Ferms or within seven (7) days after the FDIC's notice to the Ferms all their interest in all assets, claims, entitlements and choses of action, and all income, profit, or appreciation derived from such assets, claims, entitlements or choses of action in which either Ferm has any right, title or interest in or could make a claim for on the Effective Date, or on which she had any right, title or interest in the last ten (10) years, of a value of more than $1,000.00 which are not disclosed in

Exhibit 1 and in the financial statements provided pursuant to paragraph 4 below, regardless of whether said nondisclosure is intentional and regardless when said discovery occurs. Any dispute concerning whether income or assets are subject to transfer to the FDIC pursuant to this subparagraph will be resolved in accordance with paragraph 9 below.

(f) ~~The~~ La Vonne Ferms will retain and need not transfer to the FDIC the following assets listed on Exhibit 1:

(1) The Packers Circle Condominium;

(2) The Mercedes 450 SLC;

(3) The furniture at the Calcaterra Court property;

3. FDIC agrees to return to the ~~Ferms~~ La Vonne within five (5) days of the effective date that jewelry claimed by Kimberleigh Ferm which FDIC received from

the Federal Bureau of Investigation pursuant to that writ of execution levied on or about February 16, 1988 by delivering said jewelry to counsel for the Ferms.

4. Each of the Ferms represents and warrants under penalty of perjury that (a) she knows of no right, title or interest in any cash, income, asset, claim, entitlement, insurance benefit or chose of action of any nature, under the name of any person or entity, beyond those which are referred to in Exhibit 1 annexed and paragraphs 2(a) through (f) and 3 above; (b) she knows of no cash, income, assets, claims, entitlements, insurance benefit, rights to tax refund, or choses in action in which she had interest from July 1, 1986 to the Effective Date which was transferred to any other person or entity, except for those assets, income, claims, choses in

action and transfers disclosed pursuant to paragraph 5 below; and (c) she knows of now cash, income, asset, claim, entitlement, insurance benefit or chose of action in which she has an interest which has been placed in the name, possession, or custody of any person or entity, or which has otherwise been stored, deposited or concealed in any location within or without the United States of a value more than $1,000.00.

5. Commencing not later than forty-eight (48) hours after receipt of written approval of this Agreement by the FDIC, the Ferms shall the FDIC to confirm the representations and warranties made by them in paragraphs 2 and 4 above and in Exhibit 1 hereto and shall assist and cooperate with the FDIC in making this confirmation. The Ferms, to comply with this requirement, shall provide to any accountant designated by the FDIC to

conduct a confirming examination an identification of all of their income, assets, claims, entitlements, and/or choses in action in which they in good faith believe have a value of $1,000, and all changes and transfers in the same occurring since January 1, 1984, and all obligations owed by them or owing by them to others as of the date of the examination. Said accountant shall (a) have unrestricted access to and the right to review all of the Ferms' financial and other records since January 1, 1984, (b) shall have the right to ask questions of and shall receive full and complete answers to said questions from the Ferms, and (c) shall receive the full cooperation of each of the Ferms in any other manner the accountant deems necessary to perform the confirming examination. The FDIC shall have fourteen (14) days following completion

of the confirming examination to advise the Ferms in writing if it is dissatisfied with either the Ferms' warranties and representations as described in paragraph 3 or their cooperation as described in this paragraph, and in that event the FDIC may in its sole discretion declare this Agreement null, void and of no force and effect; affirm this Agreement and elect to obtain assets transferred pursuant to paragraph 2; or negotiate an amendment of this Agreement. Should the FDIC declare this Agreement void pursuant to this paragraph all assets held in escrow pursuant to paragraph 6 shall be returned to the particular Ferm from whom such asset was obtained.

6. The Ferms shall, after execution of the Agreement and not later than ~~July~~ Sept 15, 1990, deliver to Lawyer, Felix & Hall

to hold in escrow pending and until the court's determination that the settlement is in good faith and dismisses the Action as to the Ferms the following: a certified check for $_____ as required by paragraph 2(a) hereof made payable to "Lawler, Felix & Hall, attorneys for the Federal Deposit Insurance Corporation"; all duly notarized and executed deeds and other documents needed to convey title as required by paragraphs 2(b), 2(c) and 2(d) hereof. Upon entry of the court's order determining that the Agreement is a good faith settlement, and after the FDIC has delivered to counsel for the Ferms' jewelry described in paragraph 3, above, and an executed copy of this Agreement, escrow shall terminate and Lawler, Felix & Hall shall, without order by the court, deliver such items, including any accrued interest on the funds, to the FDIC in

satisfaction of the Ferms' obligations under paragraphs 2(a), (b), (c) and (d).

7. In the event that (a) any Ferm fails to timely deliver any of the items specified in paragraph 6, (b) any Ferm fails to cooperate in disclosing the information to be provided pursuant to paragraph 4 above, or (c) the court does not approve the Agreement as a good faith settlement, the Agreement shall be null and void, and all such items which have been delivered to Lawler, Felix & Hall shall be returned forthwith from the particular Ferm from whom such asset was obtained.

8. The Ferms represent and warrant that they will not seek to acquire and will not accept an equity interest in or employment from or sit as a director for any federally-insured financial institution or a subsidiary thereof for the remainder of their lives; provided,

however, that they may seek to obtain loans from such institutions and provided further the prohibited equity interest is one that would require disclosure to any state or federal regulatory agency.

9. The court presiding over the Action shall retain jurisdiction to enforce the provisions of this Agreement. In the event that either of the Ferms dispute whether an asset, claim, entitlement, insurance benefit, chose in action or any interest thereof must be transferred to the FDIC pursuant to paragraph 2(e) above, she may within the time that she is required to make the transfers as described in said paragraphs submit her dispute by means of an appropriate motion for determination by the court. Failure to submit her dispute for such determination within 30 days after she is required to make such transfers, unless the FDIC agrees in

writing that she defendants may have an extension of time to make such a submission, shall conclusively establish that Ferm's obligation to transfer said assets or interests to the FDIC and conclusively waive that Ferm's right to dispute her obligation to make such transfers in any judicial, arbitration or other forum. The court's ruling shall be a de novo determination on the evidence presented and shall be binding upon the parties.

10. The Ferms agree to cooperate with the FDIC in its ongoing civil action by voluntarily providing any truthful information or documents in their possession requested by the FDIC and by making themselves available, to testify at any trial in the civil action without the necessity of service on them of a subpoena.

11. The Ferms shall execute and

deliver to the FDIC such other instruments, and take such further action as the FDIC may reasonably request to carry out the settlement contemplated by the agreement.

12. This Agreement may be signed on behalf of the FDIC by its attorneys of record in the action.

13. Time is of the essence in the execution of an performance under this Agreement by the Ferms. The FDIC's offer of settlement pursuant to the terms of this Agreement shall be null and void unless each of the Ferms (a) executes the Agreement and delivers the executed Agreement and delivers the executed Agreement not later than ~~July~~ Sept. 15, 1990, at 5:00 p.m.; (b) delivers all cashier's checks, executed deeds, and other items described in paragraphs 2(a), (b), (c) and (d) and 6 to Lawler, Felix & Hall not ~~Sept~~

later than ~~July~~ 15, 1990, and 5:00 p.m.; make themselves and their records available for the confirming examination described in paragraph 4 commencing not later than 48 hours of receipt of written approval of this agreement by the FDIC and serve their motion for the court's approval of the settlement not later than Sept ~~July~~ 15, 1990 and set the hearing on said motion within one month of such service.

14. Except for the obligations created by or imposed pursuant to this Agreement, the FDIC for itself, its predecessors, successors and assigns forever releases the Ferms, and each of them, of and from any and all claims, demands, damages, debts, liabilities, accounts, obligations, costs, expenses, cause and causes of action of every kind and nature whatsoever, whether known or unknown, suspected or unsuspected, which now exists, arising out of, or incidental

to, (1) the Action, (2) the events giving rise to the Action, (3) the Ferms' conduct in conjunction with Ramona, if any, (4) Molinaro's transfers of assets and transfers inter se among the Ferms and (5) the operations of Ramona. The Ferms, and each of them, waive any and all claims, demands, debts, liabilities, accounts, obligations, costs, expenses, cause and causes of action of every kind and nature whatsoever, whether known or unknown, suspected or unsuspected, which now exists arising out of, or incidental to, the Action or the events giving rise to the Action against the FDIC, FSLIC, FHLBB, FHLB of San Francisco, their predecessors, successors or assigns and their employees, agents or employees.

15. All items required under this Agreement to be delivered to the FDIC shall be delivered to Lawler, Felix & Hall as attorneys for the FDIC and

directed to the attention of any of Richard L. Fruin, Jr., Edwin W. Duncan or Mark S. Lee at the following address:

Lawler, Felix & Hall
700 South Flower Street
Suite 3100
Los Angeles, CA 90017

or such other person as the FDIC may designate in writing to the Mangano parties.

16. Each of the Parties to this Agreement represents, warrants and agrees as follows:

(a) Each Party has received independent legal advice from its attorneys with respect to the advisability of making the settlement provided herein, and with respect to the advisability of executing this Agreement;

(b) No Party (nor any officer, agent, employee, representative, or attorney of or for any Party) has made any statement or representation to any

other Party regarding any fact relied upon in entering into this Agreement, and no Party is relying upon in entering into this Agreement, and no Party is relying upon any statement, representation or promise of any other Party (or of any officer, agent, employee, representative, or attorney for the other Party) in executing this Agreement or in making the settlement provided for herein, except as expressly stated in this Agreement;

(c) Each Party to this Agreement has made such investigation of the facts pertaining to this settlement and this Agreement and of all matters pertaining thereto as it deems necessary;

(d) Each Party or responsible officer or agent thereof has read this Agreement and understands the contents hereof. Each of the officers and agents executing this Agreement on behalf of this respective entities is empowered to

do so and thereby binds his respective entity;

(e) Each term of this Agreement is contractual and not merely a recital;

(f) Each Party is aware that it may hereafter discover claims or facts in addition to or different from those it now knows or believes to be true with respect to the matters referred to in this Agreement. Nevertheless, it is the intention of the Parties to fully, finally and forever settle and release all matters and all claims which do now exist, may exist, may hereafter exist, or heretofore have existed between them which are referred to in this Agreement, except as expressly provided or reserved in this Agreement; and

(g) The Parties shall execute all such further and additional documents as shall be reasonable, convenient,

necessary or desirable to carry out the provisions of this Agreement. The FDIC agrees to execute whatever documents are necessary to remove any judgment liens, liens, encumbrances or clouds on title with respect to any claims or Judgments of the FDIC on the assets to be retained by the Ferms as set forth in Section 2 of this Agreement.

17. The Ferms, and each of them, by signing this Agreement do not admit to any wrong or liability; this Agreement is made by the Ferms for the purpose of settling the Action; and each of the Ferms expressly denies liability of any kind arising from or in connection with the allegations and events described in the Action.

18. This Agreement is the entire agreement between the Parties with respect to the subject matter hereof and supersedes all prior and contemporaneous

oral and written agreement and discussions. This Agreement may be amended only by an agreement in writing.

19. This Agreement is binding upon and shall inure to the benefit of the Parties hereto, their respective agents, employees, representatives, officers, directors, attorneys, divisions, subsidiaries, affiliates, assigns, heirs, successors in interest and shareholders.

20. The documents to be provided by the Ferms pursuant to Section 5 of this Agreement, shall be deemed delivered upon deposit in the United States mail.

21. Each Party has cooperated in the drafting and preparation of this Agreement. Hence, in any construction to be made of this Agreement, the same shall not be construed against any Party by virtue of the identity of the preparer.

22. This Agreement may be executed in counterparts, and when each Party has

signed and delivered to the FDIC at least on such executed counterpart, each counterpart shall be deemed an original, and, when taken together with other signed counterparts, shall constitute one agreement, which shall be binding upon and effective as to all Parties.

23. The Parties further understand and agree that the consideration recited in this Agreement is the sole and only consideration for this Agreement.

24. The undersigned represent that they have read the Agreement, understand the Agreement, and are authorized to execute this Agreement on behalf of their

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respective Party.

FEDERAL DEPOSIT INSURANCE
CORPORATION

Dated: Nov. ~~Sept.~~ ~~July~~ 27, 1990 By (signature)

Dated: Sept. ~~July~~ __, 1990 (signature)
Kimberleigh Ferm

Dated: Sept. ~~July~~ __, 1990 (signature)
LaVonne Ferm

ARTER, HADDEN, LAWLER, FELIX & HALL
RICHARD L. FRUIN, JR
EDWIN W. DUNCAN
MARK S. LEE
J. MICHAEL ECHEVARRIA
700 South Flower Street
Los Angeles, California 90017
(213) 629-9300

Attorneys for Plaintiff
Federal Deposit Insurance
Corporation as Manager for
the FSLIC Resolution Fund

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION AS MANAGER FOR THE FSLIC RESOLUTION FUND,	)	Case No. 86-6016 AHS (Gx)
Plaintiff,	)	NOTICE OF MOTION AND MOTION FOR
vs.	)	ORDERS REQUIRING
JOHN L. MOLINARO, et al.,	)	REPAYMENT OF UNREASONABLE
Defendants.	)	FEES AND COSTS, OR
	)	ALTERNATIVE-
	)	LY
AND RELATED CROSS-ACTIONS.	)	REQUIRING AN
	)	ACCOUNTING
	)	BY
	)	KIMBERLEIGH
	)	FERM'S
	)	ATTORNEYS;

)	MEMORANDUM
)	OF POINTS
)	AND
)	AUTHORITIES
)	AND
)	DECLARATION
)	OF MARK S.
)	LEE IN
)	SUPPORT
)	THEREOF
)	
)	Date:
)	May 6, 1991
)	Time:
)	10:00 a.m.
)	Place:
)	Courtroom
)	of the Hon.
)	Alicemarie
)	H. Stotler
)	

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

Please take notice that on May 6, at 10:00 a.m. in the Courtroom of the Honorable Alicemarie H. Stotler, located at 751 West Santa Ana Boulevard, Santa Ana, California, plaintiff Federal Deposit Insurance Corporation as Manager of the FSLIC Resolution Fund ("FDIC") will move for an order requiring repayment of $581,680.42 in unreasonable

fees and costs received from frozen funds by the firm of Kurahawa and Morrissey ("K&M"), or alternatively requiring an accounting by K&M for certain fees and expenses it incurred as counsel for defendant Kimberleigh Ferm ("Ferm").

This motion is made on the grounds that Morrissey received $722,733.31 from frozen funds in 13 months to defend only 2 of the 42 claims in FDIC's complaint while charging unreasonable rates and engaging in inadequately documented, excessive, unnecessary, and/or improper actions such that good cause exists to order repayment of excessive fees or alternative evaluation of the reasonableness of those fees.

This motion is based upon the attached Memorandum of Points and Authorities and accompanying declaration of Mark S. Lee, upon all pleadings, records and files herein, of which the

court has respectfully requested to take judicial notice, and upon such other and further matters as may be presented at the hearing on this motion.

DATED: April 21, 1991

ARTER, HADDEN
LAWLER, FELIX &
HALL
RICHARD L. FRUIN, JR.
EDWIN W. DUNCAN
MARK S. LEE
J. MICHAEL ECHEVARRIA

By: (signature)
Mark S. Lee
Attorneys for
Plaintiff Federal
Deposit Insurance
Corporation as
Manager for the
FSLIC Resolution
Fund

(3)

Supreme Court, U.S.
FILED
OCT - 8 1993
OFFICE OF THE CLERK

No. 93-202

In the Supreme Court of the United States

OCTOBER TERM, 1993

KURAHARA & MORRISSEY, PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

ALFRED J. T. BYRNE
General Counsel

ANN S. DUROSS
Assistant General Counsel

COLLEEN B. BOMBARDIER
LAWRENCE H. RICHMOND
Counsel
Federal Deposit Insurance Corporation
Washington, D.C. 20429

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QUESTIONS PRESENTED

1. Whether the district court had jurisdiction, pursuant to the settlement agreement in this case, to order the defendant's attorneys, after the agreement had been executed and unadjudicated claims had been dismissed, to repay excessive fees received during the litigation from assets frozen by the court.

2. Whether the district court's finding that the attorneys' fees received from assets frozen by the court were unreasonable was clearly erroneous.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-202

KURAHARA & MORRISSEY, PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-9) is unpublished, but the decision is noted at 985 F.2d 572 (Table). The memorandum and order of the district court (Pet. App. 24-48) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 8, 1993. A petition for rehearing was denied on April 21, 1993. Pet. App. 56-57. The petition for a writ of certiorari was filed on July 20, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Savings & Loan Insurance Corporation (FSLIC), and its successor, the Federal Deposit Insurance Corporation (FDIC), alleged that John Molinaro looted a now defunct savings and loan association, and engaged in fraudulent transfers to conceal his assets.[1] Kimberleigh Ferm, Molinaro's former wife, was one of the alleged fraudulent transferees. Pet. App. 2-3, 25.

The district court entered a preliminary injunction freezing Ferm's assets. Ferm later agreed to modify the injunction to allow her to obtain a monthly living allowance and to pay her attorneys—Kurahara & Morrissey, petitioner in this case—"reasonable" fees and costs from the frozen funds.[2] Pet. App. 26-27.

In the five months immediately following the modified injunction, Ferm paid petitioner some $400,000 from the frozen funds. Suspecting that the payments were unjustified,[3] FSLIC sought an order requiring petitioner to account for the fees. Pet. App. 27. Petitioner argued that justifying its fees would undermine the attorney-client relationship, and that the district court accordingly could not require any accounting until after the

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[1] Molinaro's conduct is summarized in *FSLIC* v. *Molinaro*, 889 F.2d 899 (9th Cir. 1989), and *FSLIC* v. *Molinaro*, 901 F.2d 1490 (9th Cir. 1990). Molinaro was also convicted of over two dozen counts of bank fraud.

[2] The Ninth Circuit affirmed the injunction in *FSLIC* v. *Ferm*, 881 F.2d 1083 (9th Cir. 1989) (Table).

[3] The questionable expenditures included fees and expenses in connection with a trip by counsel to the Cayman Islands with the client to repatriate the concealed funds, attending depositions irrelevant to the claims made against petitioner's clients, and performing hundreds of hours of unexplained "research," "document review," and "deposition preparation." In addition, there were thousands of dollars in unexplained payments to "Cash." Pet. App. 41-48.

action against Ferm ended. *Id.* at 5-6. The district court denied FSLIC's motion without prejudice to refiling at the conclusion of the action. *Id.* at 6.

Petitioner received additional sums in the four months following the district court's ruling, and FSLIC moved the district court to review petitioner's billings. Pet. App. 28. Petitioner again argued that the district court should not review the reasonableness of its fees until after judgment was entered against Ferm.[4] This time, the district court granted FSLIC's motion and ordered petitioner to submit its fee statements for *in camera* review.[5] *Ibid.*

2. Subsequently, the FDIC entered into a settlement with Ferm pursuant to which Ferm agreed to transfer virtually all of her assets to FDIC, including all of the frozen funds. Ferm also agreed to a judgment against her in connection with certain of the fraudulent transfer claims, and FDIC agreed to dismiss with prejudice its remaining claims against Ferm. Pet. App. 58-86. The settlement agreement expressly contemplated that the FDIC would file a postjudgment fee motion against petitioner,[6] and preserved the district court's jurisdiction to enforce the settlement. *Id.* at 66-67, 75-76. Pursuant to

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[4] Petitioner also filed a counterclaim alleging that FSLIC, Molinaro, and the district court clerk conspired to deprive Ferm of some of the funds she had concealed overseas. The district court dismissed that counterclaim with prejudice and sanctioned petitioner for filing it. In a split decision, the Ninth Circuit reversed the sanctions. *FSLIC* v. *Molinaro*, 923 F.2d 736 (9th Cir. 1991).

[5] The Ninth Circuit affirmed that order in *FSLIC* v. *Ferm*, 909 F.2d 372 (9th Cir. 1990).

[6] Paragraph 2(d) of the Settlement Agreement stated that Ferm agreed "to cooperate with FDIC in any motion for accounting and/or motion for repayment of attorneys' fees paid from [the frozen funds]." Pet. App. 66.

the settlement, the district court entered a Stipulation and Order of Dismissal of all unadjudicated claims contained in the FDIC's complaint against Ferm. Pet. App. 20-23.

3. FDIC then filed a motion to recover unreasonable fees. Pet. App. 87-90. After seeking a two-month extension of time to file a response (see *id.* at 53-54), petitioner submitted explanations of some of its fees (see *id.* at 54) and argued that the settlement had deprived the district court of jurisdiction over the FDIC's motion. The district court rejected that argument, holding that courts generally retain jurisdiction to rule on attorney fee motions after final judgment, and that courts have continuing jurisdiction to require attorneys who received funds in violation of a preliminary injunction to return those funds even if the court lacks jurisdiction over the remainder of the action. *Id.* at 49-50. The district court ordered petitioner to pay the FDIC $398,011.97 in excessive fees and costs. *Id.* at 46-48.

4. Petitioner appealed, contending that the district court lacked jurisdiction and had wrongly assigned petitioner the burden of justifying the fees. The court of appeals affirmed, holding that the settlement agreement "explicitly contemplated a motion for repayment of attorney's fees," Pet. App. 5, and that, especially in light of petitioner's repeated arguments that any determination with respect to its fees must await conclusion of the case, "[petitioner], FDIC, and the court understood any motion for repayment of fees would be brought at the end of proceedings, after judgment had been entered." *Id.* at 6. The court of appeals declined to decide who bore the burden of proving the fees reasonable, finding that the district court's decision was sustainable regardless of how that burden was assigned. *Id.* at 6-7.

ARGUMENT

The court of appeals properly construed the settlement agreement not to release petitioner from a claim that it had received excessive fees. That decision does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. Petitioner contends (Pet. 24-26, 29-30) that this case raises questions of exceptional public importance because judicial review of fees paid out of frozen funds improperly allows one party to "second-guess" its adversary's litigation strategies. There is no basis for that contention. The funds at issue in this case were frozen during the litigation because their ownership was in dispute. All disbursements from those funds were subject to review by the district court to ensure that the terms of the freeze order were obeyed and the funds preserved for the benefit of the FDIC, should it prevail. The fact that the funds at issue here were improperly paid to an attorney—as opposed to a doctor, a stockbroker, or a plumbing contractor—is of no legal significance. Indeed, the district court took great care to protect the attorney-client relationship and the adversary process in this case by adopting petitioner's own suggestion that review of the propriety of the disbursements to petitioner should be postponed until the termination of the litigation on the merits.

As the court of appeals noted in an earlier opinion in this proceeding, appellate courts have consistently permitted district courts to review and limit the amount payable to attorneys from frozen assets. *FSLIC* v. *Ferm*, 909 F.2d 372, 373 (9th Cir. 1990), citing *United States* v. *Monsanto*, 491 U.S. 600, 616 (1989) ("a pretrial restraining order [freezing assets and prohibiting their use by attorneys] does not 'arbitrarily' interfere with

the defendant's 'fair opportunity' to retain counsel").[7] Accordingly, all that is at issue here is whether, on the particular facts of this case, the district court had jurisdiction to exercise the well-settled authority to protect frozen assets.

2. The court of appeals correctly resolved the jurisdictional issue in this case, relying principally on the settlement agreement, which expressly contemplated a postjudgment motion for attorneys' fees, required Ferm to assist the FDIC in making such a motion, and retained jurisdiction in the district court to enforce the terms of the agreement. Pet. App. 66-67, 75. The court found strong support for its interpretation of the settlement agreement in the proceedings of the case below, during which petitioner successfully opposed prejudgment fee review with the argument that any determination of the reasonableness of its fees should come after judgment was entered. Thus, the facts of this case, including both the terms of the settlement agreement and the proceedings leading up to the agreement, rebut petitioner's central premise (Pet. i, 4, 32-33, 38) that the parties intended to or did unconditionally release petitioner

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[7] Petitioner essentially argues that limiting a civil defendant to paying only "reasonable" attorney fees from a judicially frozen fund interferes with that defendant's right to the effective assistance of counsel. See Pet. 28. But see *Caplin & Drysdale, Chartered* v. *United States*, 491 U.S. 617, 626 (1989) (even a criminal "defendant has no Sixth Amendment right to spend another person's money for services rendered by an attorney, even if those funds are the only way that that defendant will be able to retain the attorney of his choice"). The district court's order here has far less effect on the attorney-client relationship than the actions this Court approved in *Caplin & Drysdale*, and thus is well within constitutional limits. Cf. *United States* v. *Bissell*, 866 F.2d 1343, 1351 (11th Cir.) ("the right to counsel of choice belongs solely to criminal defendants possessing legitimate, *uncontested* assets") (emphasis added), cert. denied, 493 U.S. 849 (1989).

from any obligation to return excessive fees paid out of the frozen assets. Review by this Court of the court of appeals' interpretation of the settlement agreement would be unwarranted.

3. Petitioner contends (Pet. 34-35) that the decision of the court of appeals finding that the district court had jurisdiction to determine the reasonableness of petitioner's fees conflicts with this Court's decision in *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418 (1911), in which the Court held that the complete settlement of an underlying suit required dismissal of an action to enforce an injunction issued during the suit. Petitioner contends that *Gompers* controls here because the fees determination was in effect an action to enforce the district court's preliminary injunction freezing Ferm's assets. Petitioner's argument, however, ignores the court of appeals' finding that in the settlement agreement terminating the litigation, Ferm and the FDIC explicitly preserved the FDIC's right to seek repayment of unreasonable attorneys' fees and the district court's jurisdiction to grant that relief. Thus, unlike *Gompers*, in which the settlement was intended to resolve all disputes, the settlement in this case expressly left open the collateral fee issue. As petitioner effectively concedes (see Pet. 22-23), that distinction renders *Gompers* inapplicable to this case.

4. Petitioner also incorrectly contends (Pet. 34-48) that the decision of the court of appeals creates a split among the circuits. Virtually all of the decisions petitioner cites concern a plaintiff's absolute right under Federal Rule of Civil Procedure 41(a)(1) to dismiss a case and thereby terminate proceedings entirely before an answer or motion for summary judgment has been filed. See *Santiago* v. *Victim Services Agency of Metro. Assistance Corp.*, 753 F.2d 219, 221 (2d Cir. 1985); *Williams* v. *Ezell*, 531 F.2d 1261, 1263 (5th Cir. 1976);

Scam Instrument Corp. v. *Control Data Corp.*, 458 F.2d 885, 889 (7th Cir. 1972). Those cases have no application where, as here, an answer has been filed and a motion has been made for summary judgment, see, *e.g.*, *Santiago*, 753 F.2d at 223 (party seeking post-suit fees could have preserved its right to recover them by filing an answer or motion for summary judgment), and where the judgment ultimately entered in FDIC's favor explicitly contemplated further proceedings with respect to the fees.

The remaining cases petitioner cites are inapposite. *National R.R. Passenger Corp.* v. *IAMAW*, 915 F.2d 43, 48 (1st Cir. 1990), involved the res judicata effect of opinions and orders entered in a suit that had later been voluntarily dismissed, and *Smith* v. *Phillips*, 881 F.2d 902 (10th Cir. 1989), involved a post-dismissal attempt to conduct substantive proceedings on the merits. Here, the post-dismissal proceedings had nothing to do with the effect of the court's orders on any later case and the proceedings concerned an entirely collateral issue—the reasonableness of the attorneys' fees—that had no bearing on the substantive issues in the case.

Contrary to petitioner's suggestion, the decision of the court of appeals is entirely consistent with the body of law addressing the postjudgment jurisdiction of district courts to adjudicate collateral matters. In *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384 (1990), this Court recently confirmed that courts can impose Rule 11 sanctions even years after a plaintiff voluntarily dismissed the action under Rule 41(a)(1) because:

> Like the imposition of costs, attorney's fees, and contempt sanctions, the imposition of a Rule 11 sanction is not a judgment on the merits of an action. Rather, it requires the determination of a collateral issue: whether the attorney has abused the judicial process, and, if so, what sanctions would be appropriate. Such

> a determination may be made after the principal suit has been terminated.

496 U.S. at 396.[8] That principle applies here, and confirms the correctness of the decision of the court of appeals.[9]

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[8] *Cooter & Gell* rejected the very argument petitioner makes here that a voluntary dismissal under Rule 41 deprives a district court of jurisdiction to evaluate attorneys' fees. This Court affirmed a Rule 11 attorneys' fee award years after the case was dismissed because the award was collateral to the merits of the action. 496 U.S. at 396.

Cooter & Gell also effectively rejected the authority petitioner principally relies upon for its "no jurisdiction" argument. The Court specifically disagreed with *Johnson Chemical Co.* v. *Home Care Products, Inc.*, 823 F.2d 28, 31 (2d Cir. 1987), noting that the Second Circuit in that case erroneously took the position petitioner takes here. 496 U.S. at 394-395. The Second Circuit's decision in *Johnson*, in turn, had relied on *Santiago* and *Williams*, see 823 F.2d at 31, whose continuing vitality is therefore in doubt.

[9] Other court of appeals decisions are in accord with the principle articulated in *Cooter & Gell*. *E.g.*, *League of Women Voters* v. *FCC*, 751 F.2d 986, 990 (9th Cir. 1985) (affirming a district court's postjudgment attorneys' fee award, despite filing of notice of appeal); *Szabo Food Service, Inc.* v. *Canteen Corp.*, 823 F.2d 1073, 1079 (7th Cir. 1987); *Kurkowski* v. *Volcker*, 819 F.2d 201, 203 (8th Cir. 1987); *Thomas* v. *Capital Security Services, Inc.*, 812 F.2d 984, 987 (5th Cir. 1987); *Jones* v. *Illinois Dep't of Rehabilitation Services*, 689 F.2d 724, 731-732 (7th Cir. 1982); *Rothenberg* v. *Security Management Co.*, 677 F.2d 64 (11th Cir. 1982).

Petitioner attempts to distinguish *League of Women Voters*, which the district court cited, by arguing that the underlying action against its client here was settled and thus that there was nothing to which the district court's fee order could be collateral. That argument is meritless because (1) there was an appeal pending when the district court entered its fee order, and (2) the attorneys' fee issue was collateral to the adjudicated and dismissed claims involving petitioner's client, just as it was in *Cooter & Gell* and the other cases cited herein.

5. Petitioner finally contends (Pet. 54-62) that the district court improperly shifted to petitioner the burden of proving its fees reasonable. The court of appeals declined to decide that issue, however, ruling instead that regardless of who bore the burden of proof, the record supported the district court's finding that some of the fees were unreasonable:

> If [petitioner] bore the burden, it failed to provide sufficient information for the district court to assess the reasonableness of its fees. If FDIC bore the burden, it presented sufficient evidence to establish prima facie that the fee requests were not properly supported. * * * [Petitioner] offered no evidence to the contrary, but simply argued FDIC had failed to meet its burden of proof. On this record, we cannot say the district court's finding that certain of [petitioner's] requests for fees were unreasonable was clearly erroneous.

Pet. App. 6-7. The finding by the court of appeals that there was sufficient factual support for the district court's decision was correct and does not warrant further review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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